

UNDER THE HOOD: BRENDAN DASSEY, LANGUAGE
IMPAIRMENTS, AND JUDICIAL IGNORANCE

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INTRODUCTION: MAKING A MURDERER?

The 2015 Netflix documentary “Making a Murderer” was a world-wide sensation.¹ The ten-part series told the story of Steven Avery of Manitowoc, Wisconsin, and his nephew, Brendan Dassey, who were convicted of the gruesome 2006 homicide of Teresa Halbach.² The series raised serious questions about whether the two were actually guilty or the victims of law enforcement malfeasance.³ Viewers were

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¹ *Making a Murderer* (Netflix 2015). In 2018, *Making a Murderer* Season 2 premiered. This second 10-part series focused on post-conviction investigation and proceedings. See Alison Dirr, *Making a Murderer Part 2’ Attorneys: Series Highlights Painstaking Post-Conviction Process*, APPLETON POST-CRESCENT (Oct. 23, 2018), <https://www.postcrescent.com/story/news/local/steven-avery/2018/10/23/making-murderer-part-2-shows-arduous-post-conviction-process/1726391002/>.

² See *Making a Murderer*, *supra* note 1.

³ See Brandon Golob, *Un-Making a Murderer: New Media’s Impact on (Potential) Wrongful Conviction Cases*, 54 CAL. W. L. REV. 137, 148–49 (2017).

divided on Avery, with as many saying he was guilty as not guilty.⁴ Viewers were not nearly as divided, however, about Avery's sixteen-year-old nephew, Brendan Dassey.⁵

Brendan was a developmentally-delayed special education student whose treatment by all parts of the criminal justice system, including his own attorney, was at best an embarrassment, and at worst, the direct cause of a grotesque wrongful conviction.⁶ For many, the most disturbing aspect was the footage of eager law enforcement extracting a "confession" from Brendan in ways that were both comical and cynical.⁷ One commentator likened the interrogation to training a new puppy.⁸ The most memorable part of the interrogation came when investigators harangued Brendan about what was done to Ms. Halbach's head. Brendan proceeded to guess: Cut off her hair? Punched her? Cut her throat? When he said he could not remember anything else despite investigators' insistence, they blurted out: "Alright, I'm just gonna come out and ask you, who shot her in the head?" Brendan replied, "he [Avery] did."⁹ When asked why he had not told them, Brendan said, "[c]ause I couldn't think of it."¹⁰ Later, after Brendan had "confessed" to raping and killing Ms. Halbach, he asked if he could return to school because he had "a project due in [sixth] hour."¹¹

Not surprisingly, the full statement is filled with contradictions and physical impossibilities. Nevertheless, law enforcement cobbled together enough of a confession to form the basis of the charge that Brendan had assisted Steven Avery in killing Ms. Halbach.¹²

Despite glaring overreach by law enforcement (the series only captured a miniscule fraction), the trial court found that Brendan's confession was voluntary and it was admitted as the primary piece of

⁴ See, e.g., Michael Shammas, *Making an Accomplice: Why "Making a Murderer's" Brendan Dassey Deserves a Re-Trial – Even if His Uncle Doesn't*, HUFFINGTON POST (Jan. 7, 2017), https://www.huffingtonpost.com/mike-shammas/making-an-accomplice-why-_b_8936546.html. Making a Murderer Season 2 focuses in large part on Avery's post-conviction attempts to locate other potential suspects. *Making a Murderer* (Netflix 2018).

⁵ See, e.g., Shammas, *supra* note 4.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.* ("They treated Brendan like I treat my beagle puppy when I want him to stop ransacking the carpet. When Brendan implicated himself in criminal activity, the police squeaked: 'Good boyyy. Good doggie!!' They rewarded him with Mountain Dew and sandwiches. 'Have a treat, boy!' But when he stuck to his original story—the one devoid of rape and murder—they scowled: 'Bad doggie! No rest for you!'").

⁹ See *Making a Murderer: Plight of the Accused* 55:30 (Netflix 2015).

¹⁰ *Id.*

¹¹ *Id.*

¹² See Shammas, *supra* note 4.

evidence in his trial.¹³ He was convicted as a party to the homicide and sentenced to life imprisonment.¹⁴ The voluntariness of Brendan's confession was the primary issue in an unsuccessful state appeal and federal habeas corpus action.¹⁵ Brendan continues to serve a life sentence.¹⁶

The co-authors watched "Making A Murderer" with both personal and professional interest. Of course, we were taken by the drama, though we knew the outcome for Avery and Dassey long before the show ever appeared. But we were particularly intrigued by the interrogation of Brendan Dassey. More specifically, we were curious about the linguistic aspects of the interrogation. We both have professional interest in language impairments, i.e., deficits in language and language usage.¹⁷ We are well aware that despite the innocuous name, language impairments can be serious disabilities with potentially catastrophic effects. We are also aware that individuals with language impairments are substantially overrepresented in the criminal and juvenile justice systems.¹⁸ Though the documentary never came out and said that Brendan had a language impairment (throughout the program and the criminal case itself, there are references to Brendan's intellectual deficits and borderline IQ, but there are few specifics), we were fairly certain he did. And if he did, we were certain it would have had a profound effect on the interrogation.

Our first step was an easy online search of court records, where we found documentation that Brendan did indeed have a severe language-based specific learning disability and multi-faceted language impairment that placed his communication and processing

¹³ See *State v. Dassey*, 2013 WI App 30U, ¶ 6, 346 Wis. 2d 278, 827 N.W.2d 928 (per curiam).

¹⁴ See *Dassey v. Dittmann*, 201 F. Supp. 3d 963, 985 (E.D. Wis. 2016), *aff'd*, 860 F.3d 933 (7th Cir. 2017), *reh'g en banc granted, opinion vacated* (Aug. 4, 2017), *on reh'g en banc*, 877 F.3d 297 (7th Cir. 2017), *and rev'd*, 877 F.3d 297 (7th Cir. 2017).

¹⁵ See *Dassey*, 877 F.3d at 300–01, 311 (citing *Dassey*, 2013 WI App 30U, ¶ 7).

¹⁶ Alex Davies, *Making a Murderer Season 3: Is Brendan Dassey Still in Jail? Exclusive*, EXPRESS (Jan. 21, 2019), <https://www.express.co.uk/showbiz/tv-radio/1058989/making-a-murderer-season-3-is-brendan-dassey-still-in-jail-prison-steven-avery>.

¹⁷ See Carla J. Johnson et al., *Twenty-Year Follow-Up of Children with and Without Speech-Language Impairments: Family, Educational, Occupational, and Quality of Life Outcomes*, 19 AM. J. SPEECH-LANGUAGE PATHOLOGY 51, 54 (2010); Michele LaVigne & Gregory Van Rybroek, "He Got in My Face so I Shot Him": How Defendants' Language Impairments Impair Attorney-Client Relationships, 17 CUNY L. REV. 69, 72 (2014).

¹⁸ See Abbe D. Davis et al., *Language Skills of Delinquent and Nondelinquent Adolescent Males*, 24 J. COMM. DISORDERS 251, 252 (1991) (citing studies that show anywhere from 58%-84% of institutionalized delinquents had language or communication difficulties, many of which would be classified as severe); Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. DAVIS J. JUV. L. & POL'Y 37, 43–44 (2011).

skills in the lowest percentiles of all juveniles his age.¹⁹ Brendan's brutally low scores, which one expert termed "appalling,"²⁰ inspired us to undertake a closer look at the language of the interrogations. With the assistance of a language transcription company, we conducted a thorough qualitative and quantitative analysis of the communication and language of the complete interrogation. We took a deep look under the hood, examining the volume and structure, as well as the content, of what was said by both Brendan and law enforcement.

We quickly concluded that the interviewing "technique" utilized by law enforcement was a chaotic, unprofessional mess. Almost everything the two officers did in the course of interrogating Brendan violated the most minimal standards for interviewing any juvenile, but especially one with underdeveloped language and communication skills. They inundated him with verbiage, continuously asked multiple questions within a single turn, spoke in paragraphs, changed topics in the middle of an oration, asked *hundreds* of leading questions and planted content *thousands* of times.²¹ By the time we finished our review, we were, and are, confident that the verbal behavior of law enforcement throughout the interrogations of Brendan, coupled with his poor ability to linguistically cope and his age, made him a prime candidate for unwillingly—and unwittingly—confessing to a crime he did not commit.²²

Our analysis has little in common with the voluntariness ruling by

¹⁹ See Trial Exhibit 219, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007) (Evaluation Report for Determination of Eligibility for Special Education from Mishicot Sch. Dist. for Brendan Dassey, Mishicot, Wis. (Sept. 29, 2005)), http://www.stevenaverycase.org/wp-content/uploads/2017/03/Dassey-Trial-Exhibit-219-IEP-progress-report-9.29.05_Redacted.pdf; *infra* Part VI. The trial exhibits cited herein are available at <http://www.stevenaverycase.org>.

²⁰ E-mail from Alison McCullough, MBE, Head of N. Ir. Office, Royal Coll. of Speech & Language Therapists, to Michele LaVigne, Distinguished Clinical Professor of Law, Univ. of Wis. Law Sch. (Sept. 6, 2017, 09:03 AM MDT) (on file with author).

²¹ See, e.g., Interview by Mark Wiegert, Investigator, & Tom Fassbender, Special Agent, Calumet Cty. Sheriff's Dep't, with Brendan Dassey at Two Rivers Police Dep't (Feb. 27, 2006), http://www.stevenaverycase.org/wp-content/uploads/2016/02/Brendan-Dassey-Interview-at-Station-Transcript-2006Feb27_text.pdf [hereinafter February Interview]; Interview by Mark Wiegert, Investigator, & Tom Fassbender, Special Agent, Calumet Cty. Sheriff's Dep't, with Brendan Dassey in Manitowoc, Wis. (Mar. 1, 2006), http://www.stevenaverycase.org/wp-content/uploads/2016/02/Brendan-Dassey-Interview-Transcript-2006Mar01_text.pdf [hereinafter March Interview].

²² See, e.g., *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (citing *Payne v. Arkansas*, 356 U.S. 560, 568 (1958)); see Saul Kassin, *Why SCOTUS Should Examine the Case of "Making a Murderer's" Brendan Dassey*, AM. PSYCHOL. ASS'N (June 12, 2018), <https://www.apa.org/news/press/op-eds/scotus-brendan-dassey.aspx>.

the trial court.²³ That ruling demonstrated a remarkable ignorance of how humans communicate in general, let alone the special issues presented by someone like Brendan Dassey. The decision instead closely parsed apparent promises of leniency to show that they were not actual promises of leniency, and noted that law enforcement did not yell and allowed Brendan to sit on a soft couch.²⁴ The decision even suggested that Brendan was not really a special education student because part of his school days was spent in “regular-track high school classes.”²⁵ Tragically, this decision was the foundation for a long legal journey that ended in June 2018 with a denial of certiorari by the U.S. Supreme Court.²⁶

Admittedly, nobody else involved in the case seemed to know much about communication or Brendan’s impairments either—not law enforcement, not even his own pre-trial attorney.²⁷ A record of Brendan’s language disability and its significance was never developed during the pretrial hearings, although counsel possessed the testing results.²⁸ Of course, in order to remain so oblivious, all parties must have completely disregarded the records that laid out Brendan’s deficits in the plainest of terms.²⁹ And they must have

²³ See *State v. Dassey*, No. 06-CF-88, slip op. at 12 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006), https://jenniferjsslate.files.wordpress.com/2019/03/dassey_decision_motion_to_suppress_5.12.2006.pdf.

²⁴ See *State v. Dassey*, 2013 WI App 30U, ¶ 6, 346 Wis. 2d 278, 827 N.W.2d 928 (per curiam); *Dassey*, slip op. at 7–8, 10.

²⁵ See *Dassey*, 2013 WI App 30U, ¶ 6; *Dassey*, slip op. at 3.

²⁶ See *Dassey v. Dittman*, 201 F. Supp. 3d 963 (E.D. Wis. 2016), *aff’d*, 860 F.3d 933 (7th Cir. 2017), *reh’g en banc granted*, *opinion vacated* (Aug. 4, 2017), *on reh’g en banc*, 877 F.3d 297 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018).

²⁷ Brendan’s pre-trial attorney Len Kachinsky was removed from the case on August 25, 2006. Order Directing Counsel to Withdraw, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Aug. 25, 2006), <http://www.stevenaverycase.org/wp-content/uploads/2017/03/Order-Directing-Counsel-to-Withdraw.pdf>. He was replaced by Attorneys Mark Fremgen and Ray Edelstein for trial. Memorandum and Order at 2, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Dec. 13, 2010), <http://www.stevenaverycase.org/wp-content/uploads/2017/02/2010-12-13-Post-Conviction-Memorandum-Decision-and-Order.pdf>. Of the three, only Mr. Edelstein seemed to acknowledge that Brendan had communication deficits. Unfortunately, he did not develop much of a record about their significance at trial. See Transcript of Motion Hearing (Day 4) at 200, 215–17, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Jan. 21, 2010), <http://www.stevenaverycase.org/wp-content/uploads/2017/02/2010-01-21-Post-Conviction-Motion-Hearing-Day-4.pdf>; see also Transcript of Trial (Day 6) at 75–79, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 21, 2007), https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/56932ae6a976af0bfc5a9907/1452485355120/dassey_4_21_07.pdf (discussing how Brendan has delays in basic reading comprehension and language skills).

²⁸ See, e.g., Transcript of Motion Hearing at 91–95, 100, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. May 4, 2006), <http://www.stevenaverycase.org/wp-content/uploads/2017/03/Transcript-of-Hearing-on-Motion-to-Suppress.pdf>.

²⁹ See *infra* Part VI, for a discussion of the records; see also Trial Exhibit 219, *supra* note 19 (finding that Brendan had a documented learning disability and speech or language

been blind to the behavioral and verbal cues that Brendan would have provided any time they met.

This Article describes our under-the-hood analysis of the interrogations of Brendan Dassey and explains why we believe that reckless and amateurish behavior of law enforcement in the face of Brendan's communication deficits directly contributed to an involuntary, and utterly unreliable confession. We are hardly alone in thinking that the confession violates the most basic standards of common decency and due process, and that, even with the existing record, it never should have been admitted at trial.³⁰ Our analysis simply provides another layer. You could say that this is our fantasy attempt to supplement the record, albeit a decade later. This is also our attempt to proselytize about language impairments and their insidious effects.

Our approach is interdisciplinary and informed by our experiences and research in two different fields—law and speech-language pathology. While the legal community in the United States is just beginning to notice the speech-language profession,³¹ we have found that law and speech-language pathology are a natural fit. Co-author Dr. Sally Miles' clinical and research expertise in the field of speech-language pathology has allowed us to collect and analyze language data in ways not usually found in law.³² She has also provided clinical observations along with expert opinions of the type that a lawyer would rely on both in and out of court.³³

This Article will not rehash or reframe the material covered in the pleadings filed in state and federal court on Brendan's behalf. Those motions and supporting briefs did a masterful job of describing the myriad ways that law enforcement unambiguously fed Brendan—a child—specific incriminating details, promised leniency, and repeatedly lied about their “superior knowledge.”³⁴

impairment).

³⁰ See, e.g., *Dassey v. Dittmann*, 877 F.3d 297, 319 (7th Cir. 2017) (en banc) (Rovner, J., Wood, C.J., Williams, J., dissenting), *cert. denied*, 138 S. Ct. 2677 (2018).

³¹ See LaVigne & Van Rybroek, *supra* note 18, at 120–22.

³² Obviously, the speech-language pathologist and the law professor made different contributions to this enterprise. Rather than attempt to sort out who did what, this Article simply attributes all actions and conclusions to “the co-authors” or “we.”

³³ See FED. R. EVID. 702.

³⁴ We recommend that anybody interested in the subject of false confessions and the Reid Technique read the pleadings. See Reply Brief for Petitioner at 7–8, *Dassey v. Dittmann*, 138 S. Ct. 2677 (2018) (No. 17-1172), <http://www.stevenavercase.org/wp-content/uploads/2018/05/Dassey-Reply-Brief.pdf>; Brief in Opposition at 6, 13, 30, *Dassey*, 138 S. Ct. 2677 (No. 17-1172), <http://www.stevenavercase.org/wp-content/uploads/2018/05/Dassey-Brief-in-Opposition.pdf>; Brief of Petitioner-Appellee at 2, 5, *Dassey v. Dittmann*, 860 F.3d 933 (7th Cir. 2017) (en banc) (No. 16-3397), <http://www.stevenavercase.org/wp-content/uploads/2016/12/Dassey-Appellee->

Here, the focus is not so much on what was said by law enforcement, but how it was said. And, why how it was said would prey on the very specific weaknesses of someone like Brendan. We provide examples throughout our analysis and discussion, but readers are encouraged to listen to the recordings of the interrogations to get the full flavor.³⁵

This Article is foundation-heavy. We spend considerable time talking about language impairments in general and the science of interviewing. This type of background information is necessary for our analysis to make any sense. Then, we turn to this case. First, we discuss what we learned about Brendan's language impairments from his school records (all in the court record) and what they tell us about his communicative ability to cope in an interrogation. Then, we move on to our qualitative and quantitative analysis of the interviews/interrogations. We certainly looked at Brendan's verbal and non-verbal conduct, but as the discussion reflects, we ended up paying more attention to law enforcement's verbal and non-verbal conduct because it was so much more remarkable—and not in a good way. Finally, we return to the court decisions—the trial court and the Seventh Circuit Court of Appeals en banc majority—to show how courts completely missed the realities of Brendan's impairments and the egregiousness of the interviewing “technique” used by law enforcement.

There will be no happy ending to this Article. As Judge Ilana Rovner said in her scathing dissent to the Seventh Circuit en banc decision, this is “a profound miscarriage of justice.”³⁶ The best we can hope is that the knowledge and principles we have applied can inform other cases. There are countless Brendan Dasseys at the receiving end of the criminal justice system, and they all deserve justice.

Brief_redatced.pdf; Reply Brief of Respondent-Appellant at 4–5, 7, *Dassey*, 860 F.3d 933 (No. 16-3397), <http://www.stevenaverycase.org/wp-content/uploads/2016/12/States-Reply-Brief.pdf>; see also Krista Johnson, *Common Interrogation Techniques Suspected of Causing False Confessions*, WIS.WATCH.ORG (July 23, 2017), <https://www.wisconsinwatch.org/2017/07/common-interrogation-technique-suspected-of-causing-false-confessions/> (explaining the Reid Technique and how it was misused to elicit a false confession from Brendan).

³⁵ Audio recordings of Brendan's interrogations are available online. See generally *Police Interviews and Interrogations and Audio Recordings*, STEVEN AVERY TRIAL TRANSCRIPTS & DOCUMENTS, <http://www.stevenaverycase.org/police-interviews-and-interrogations/> (last visited Feb. 23, 2019) (providing examples of instances where police used a forceful tone when Brendan provided insufficient answers); see also Brian McCorkle, *The Importance of Understanding*, CONVOLUTED BRIAN: WEBLOG BRIAN MCCORKLE (last updated Nov. 25, 2016), https://www.convolutedbrian.com/dassey_confessions_links.html (providing instances where police would switch tone of voice to sound disappointed in Brendan so that he would not lie).

³⁶ See *Dassey v. Dittmann*, 877 F.3d 297, 337 (7th Cir. 2017) (en banc) (Rovner, J., Wood, C.J., Williams, J., dissenting).

I. *STATE OF WISCONSIN V. BRENDAN DASSEY*

Teresa Halbach of northeastern Wisconsin went missing on October 31, 2005.³⁷ She was last seen on the property of Steven Avery of Manitowoc, Wisconsin.³⁸ Within two weeks, it was determined that she had been murdered and her body mutilated.³⁹ Ms. Halbach's remains were found on Avery's property.⁴⁰ From the beginning, Avery was the prime suspect.⁴¹

On November 5th, Avery's sixteen-year-old nephew, Brendan Dassey, who lived with his family down the road from Avery, was interviewed by law enforcement from neighboring Marinette County.⁴² Law enforcement was attempting to find out whether Brendan had seen Ms. Halbach on Avery's property.⁴³ Avery was officially charged with the crime on November 15, 2005.⁴⁴

In February 2006, law enforcement was alerted to the fact that Brendan had been acting strangely and had been seen on Avery's property on October 31st.⁴⁵ On February 27th, Brendan was interviewed by Calumet County Sheriff's Investigator Mark Wiegert and Wisconsin Department of Justice Special Agent Tom Fassbender (Wiegert and Fassbender).⁴⁶ He was questioned twice with his mother's consent, once at school and then at the local police station.⁴⁷

³⁷ *Man Cleared of Rape Now to Face Murder Charge*, NBC NEWS (Nov. 11, 2005), http://www.nbcnews.com/id/10003226/ns/us_news-crime_and_courts/t/man-cleared-rape-now-face-murder-charge/#.XEzQylxKjIV.

³⁸ *State v. Avery*, 2011 WI App 124, ¶ 4, 337 Wis. 2d 351, 804 N.W.2d 216.

³⁹ *See Dassey v. Dittmann*, 201 F. Supp. 3d 963, 967–69 (E.D. Wis. 2016), *aff'd*, 860 F.3d 933 (7th Cir. 2017), *reh'g en banc granted, opinion vacated* (Aug. 4, 2017), *on reh'g en banc*, 877 F.3d 297 (7th Cir. 2017), *and rev'd*, 877 F.3d 297 (7th Cir. 2017).

⁴⁰ *See Avery*, 2011 WI App 124, ¶¶ 7, 30.

⁴¹ *See id.* ¶ 30.

⁴² *See* ANTHONY O'NEILL, MARINETTE CTY. SHERIFF'S DEP'T, INVESTIGATIVE DIVISION, SUPPLEMENTAL REPORT 1 (Jan. 31, 2016), <http://www.stevenaverycase.org/wp-content/uploads/2016/01/Brendan-Dassey-Interview-Report-2005Nov06.pdf>.

⁴³ *See id.* at 2.

⁴⁴ *See Avery*, 2011 WI App 124, ¶ 4.

⁴⁵ *See Dassey v. Dittman*, 201 F. Supp. 3d 963, 969 (E.D. Wis. 2016), *aff'd*, 860 F.3d 933 (7th Cir. 2017), *reh'g en banc granted, opinion vacated* (Aug. 4, 2017), *on reh'g en banc*, 877 F.3d 297 (7th Cir. 2017), *and rev'd*, 877 F.3d 297 (7th Cir. 2017).

⁴⁶ *See* February Interview, *supra* note 21. Although the homicide occurred in Manitowoc County, the case was assigned to Calumet County due to a conflict of interest. *See* Defendant's Statement on Planted Blood at 17–18, *State v. Avery*, No. 2005-CF-381 (Wis. Cir. Ct., Manitowoc Cty. Jan. 17, 2007), <http://www.stevenaverycase.org/wp-content/uploads/2016/01/Defendants-Statement-on-Planted-Blood.pdf>. Avery had sued Manitowoc County for wrongful conviction in a previous sexual assault case, which was still pending at the time of the homicide. *See Avery v. Manitowoc Cty.*, 428 F. Supp. 2d 891, 893 (E.D. Wis. 2006). Soon after Avery was charged, the county settled. *See id.*

⁴⁷ *See State v. Dassey*, 2013 WI App 30U, ¶ 3, 346 Wis. 2d 278, 827 N.W.2d 928 (per curiam).

On March 1st, Wiegert and Fassbender met Brendan at school and told him they wanted to “interview” him some more at the local police station, again with his mother’s permission.⁴⁸ After a tortuous process, Brendan began to affirm or provide a series of incriminating details which formed the basis of a “confession.”⁴⁹ Based on this confession to Wiegert and Fassbender, Brendan was charged as a party to the crime of homicide.⁵⁰ The confession was the primary evidence against him.⁵¹

Pretrial counsel Len Kachinsky filed a motion to suppress on the grounds that Brendan’s statement was not voluntary.⁵² The school psychologist testified that Brendan has documented cognitive and learning deficits.⁵³ After hearing the testimony, and watching a recording of the March 1st interrogation, the court denied the motion, finding that the confession was voluntary.⁵⁴ In its decision, the court made twelve findings of fact about Brendan’s behavior and characteristics and law enforcement conduct.⁵⁵ As will be discussed in Part VIII, in these findings, and the resulting conclusions of law, the trial court demonstrated little awareness of the subtleties of Brendan’s communication, developmental, and cognitive issues, even less awareness of the subtleties of Wiegert and Fassbender’s communication, and absolutely no recognition of how the combination would have affected the interrogation.⁵⁶

⁴⁸ See *id.*

⁴⁹ See *Dassey*, 201 F. Supp. 3d at 970, 975; February Interview, *supra* note 21; March Interview, *supra* note 21.

⁵⁰ See *id.* at 975.

⁵¹ See Complaint at 5–7, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Mar. 2, 2006), <https://static1.squarespace.com/static/5691be1b25981daa98f417c8t/5693184d2399a318017290cb/1452480590712/Criminal+Complaint+-+Dassey.pdf>. See *Dassey*, 201 F. Supp. 3d 963, for an excellent review of the events leading up to Brendan being charged.

⁵² See Transcript of Motion Hearing, *supra* note 28, at 3. Kachinsky stipulated that Brendan was not in custody, which meant *Miranda* was not an issue. See *State v. Dassey*, No. 06-CF-88, slip op. at 11 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006). The trial court ruled that even if *Miranda* had been raised, the requirements of a knowing, intelligent, and voluntary waiver had been met. See *id.* at 11–12..

⁵³ See Transcript of Motion Hearing, *supra* note 28, at 89–91.

⁵⁴ See *Dassey*, slip op. at 11. Wisconsin law on voluntariness is identical to federal law. See *State v. Jerrell C.J.*, 2005 WI 105, ¶ 18, 283 Wis. 2d 145, 699 N.W.2d 110 (“[A] defendant’s statements are voluntary ‘if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant’s ability to resist.’”) (quoting *State v. Hoppe*, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W.2d 407).

⁵⁵ See *Dassey*, slip op. at 3–10.

⁵⁶ See, e.g., *Dassey v. Dittman*, 877 F.3d 297, 336 (7th Cir. 2017) (en banc) (Rovner, J., Wood, C.J., Williams, J., dissenting) (“No reasonable state court, knowing what we now know about coercive interrogation techniques and viewing *Dassey*’s interrogation in light of his age, intellectual deficits, and manipulability, could possibly have concluded that *Dassey*’s confession

Brendan went to trial.⁵⁷ Trial counsel sought to show that Brendan's confession was unreliable and inherently false.⁵⁸ Again, the school psychologist testified, as did an expert on suggestibility.⁵⁹ Brendan himself testified, haplessly trying to explain how he came to confess to a crime he said he did not commit.⁶⁰ The jury convicted him.⁶¹

On appeal the central issue was the voluntariness of Brendan's confession to Wiegert and Fassbender.⁶² Appellate counsel first proceeded under a Wisconsin post-conviction statute that allows a defendant to return to the trial court to supplement the record before proceeding with an appeal.⁶³ At the hearing on the post-conviction motion, counsel presented Dr. Richard Leo, who testified at length regarding the science of false confessions.⁶⁴ Dr. Leo also testified about Wiegert and Fassbender's coercive techniques and Brendan's vulnerability to those techniques because of his age and intellectual limitations.⁶⁵ A central point of contention was the number of times that Wiegert and Fassbender contaminated the interview by directly feeding facts which were then parroted back by Brendan.⁶⁶ The motion was denied.⁶⁷ The court reaffirmed its original findings and

was voluntarily given."), *cert. denied*, 138 S. Ct. 2677 (2018).

⁵⁷ See *State v. Dassey*, 2013 WI App 30U, ¶ 2, 346 Wis. 2d 278, 827 N.W.2d 928 (per curiam).

⁵⁸ See *Dassey*, 2013 WI App 30U, ¶¶ 1, 4.

⁵⁹ See Transcript of Trial (Day 6), *supra* note 27, at 71; Transcript of Trial (Day 8) at 4, 56, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 24, 2007), https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/56932b07a976af0bfc5a9a06/1452485392481/dassey_4_24_07.pdf. According to Dr. Gordon's testimony, Brendan's impaired intellectual functioning, learning disabilities, and psychological profile made him highly suggestible, especially when presented with leading questions and pressure. See Transcript of Trial (Day 8), *supra* at 56.

⁶⁰ See Transcript of Trial (Day 7) at 42–46, 64–74, 75–77, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 23, 2007), https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/56932af7a976af0bfc5a9985/1452485372736/dassey_4_23_07.pdf.

⁶¹ See Transcript of Trial (Day 9) at 159–60, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007), https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/56932b1ca976af0bfc5a9a80/1452485410073/dassey_4_25_07.pdf.

⁶² See *Dassey*, 2013 WI App 30U, ¶¶ 1–7.

⁶³ See WIS. STAT. § 809.30(2) (2018); Transcript of Motion Hearing (Day 1) at 7, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Jan. 15, 2010), <http://www.stevenaverycase.org/wp-content/uploads/2017/02/2010-01-15-Post-Conviction-Motion-Hearing-Day-1.pdf>.

⁶⁴ See Transcript of Motion Hearing (Day 2) at 87–290, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Jan. 19, 2010), <http://www.stevenaverycase.org/wp-content/uploads/2017/02/2010-01-19-Post-Conviction-Motion-Hearing-Day-2.pdf>.

⁶⁵ See *id.* at 163–65.

⁶⁶ See Brief of Defendant-Appellant at 90–92, *State v. Dassey*, 2013 WI App 30U, 346 Wis. 2d 278, 827 N.W.2d 928 (No. 2010AP3105–CR); see also *Dassey v. Dittman*, 877 F.3d 297, 324–29 (7th Cir. 2017) (en banc) (Wood, C.J., Rovner, J., Williams, J., dissenting) (providing charts summarizing how investigators coerced facts from Brendan), *cert. denied*, 138 S. Ct. 2677 (2018); Transcript of Motion Hearing (Day 2), *supra* note 64, at 209–10.

⁶⁷ See *State v. Dassey*, No. 06-CF-88, slip op. 1, 32 (Wis. Cir. Ct., Manitowoc Cty. Dec. 13,

bolstered those findings with the strength of the case.⁶⁸

The Wisconsin Court of Appeals affirmed the trial court ruling in a short twenty-three paragraph opinion.⁶⁹ In the brief two paragraphs that analyzed the circumstances of the interrogation and confession, the court adopted the trial court's findings wholesale:

The trial court heard the testimony of Dassey's mother, his school psychologist and a police interviewer, and had the benefit of listening to the audiotapes and viewing the videotaped interviews. The trial court found that Dassey had a "low average to borderline" IQ but was in mostly regular-track high school classes; was interviewed while seated on an upholstered couch, never was physically restrained and was offered food, beverages and restroom breaks; was properly Mirandized; and did not appear to be agitated or intimidated at any point in the questioning. The court also found that the investigators used normal speaking tones, with no hectoring, threats or promises of leniency; prodded him to be honest as a reminder of his moral duty to tell the truth; and told him they were "in [his] corner" and would "go to bat" for him to try to achieve a rapport with Dassey and to convince him that being truthful would be in his best interest. The court concluded that Dassey's confession was voluntary and admissible.

The [trial] court's findings *are not clearly erroneous*.⁷⁰

The Wisconsin Supreme Court declined to take review.⁷¹

Attorneys then filed a petition for habeas corpus in the Eastern District of Wisconsin.⁷² In a lengthy opinion, Magistrate Judge Duffin examined the confession in light of the conduct of Wiegert and Fassbender and their "highly leading questions."⁷³ "[T]he court acknowledge[d] significant doubts as to the reliability of Dassey's

2010), <http://www.stevenaverycase.org/wp-content/uploads/2017/02/2010-12-13-Post-Conviction-Memorandum-Decision-and-Order.pdf>.

⁶⁸ See *id.* at 20–22.

⁶⁹ See *Dassey*, 2013 WI App 30U.

⁷⁰ *Id.* ¶¶ 6–7, 2013 Wisc. App. LEXIS 85, at *2 (emphasis added).

⁷¹ See *State v. Dassey*, 2013 WI 82U, ¶ 1, 350 Wis. 2d 703, 839 N.W.2d 866.

⁷² See *Dassey v. Dittman*, 201 F. Supp. 3d 963, 985 (E.D. Wis. 2016), *aff'd*, 860 F.3d 933 (7th Cir. 2017), *reh'g en banc granted, opinion vacated* (Aug. 4, 2017), *on reh'g en banc*, 877 F.3d 297 (7th Cir. 2017), *and rev'd*, 877 F.3d 297 (7th Cir. 2017).

⁷³ See *id.* at 998.

confession,”⁷⁴ but also acknowledged that as a constitutional matter, reliability is for the jury, not for a court ruling on voluntariness.⁷⁵

The court went on, however, to find that, looking at “the totality of the circumstances,”⁷⁶ including Brendan’s age, lack of familiarity with the criminal justice system, lack of a parent present, Wiegert and Fassbender’s paternalistic and exploitive behavior, and promises of leniency,⁷⁷ Brendan’s confession was involuntary, and the case was remanded.⁷⁸ A divided three-judge panel of the U.S. Court of Appeals for the Seventh Circuit affirmed that ruling.⁷⁹

That decision was subsequently reversed by an en banc panel of the Court of Appeals in December 2017.⁸⁰ In the 4-3 decision the Court found that despite its “relative brevity,” the state court of appeals’ terse two-paragraph endorsement of the trial court findings was sufficient to satisfy the reasonableness standard of 28 U.S.C. § 2254(d),⁸¹ and that the federal courts were therefore required to defer to the state court findings. There were two strongly worded dissents. The first, by Chief Judge Diane Wood began:

⁷⁴ *Id.*

⁷⁵ *Id.* at 999.

⁷⁶ *See id.* at 1005 (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). When determining voluntariness, courts are to use a totality of the circumstances test. Relevant factors for consideration include where the questioning occurred, how long it lasted, what was said, whether the suspect was allowed to leave, and personal characteristics of the accused. *See J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011); *id.* at 286 (Alito, J., dissenting).

⁷⁷ *See Dassey*, 201 F. Supp. 3d at 1005. The court held that findings of no promises of leniency were unreasonable. *See id.* at 1003 (citing *O’Quinn v. Spiller*, 806 F.3d 974, 978 (7th Cir. 2015)) (“Concluding that the investigators never made any such promises was no minor error but rather a fact that was central to the court’s voluntariness finding. Given the other facts that tend to support the conclusion that Dassey’s confession was involuntary, as discussed above, this unreasonable determination of fact was undoubtedly crucial in the courts’ ultimate decision that Dassey’s confession was voluntary.”).

⁷⁸ *See Dassey*, 201 F. Supp. 3d at 1005, 1006.

⁷⁹ *See Dassey v. Dittmann*, 860 F.3d 933, 983 (7th Cir. 2017), *reh’g en banc granted, opinion vacated* (Aug. 4, 2017), *on reh’g en banc*, 877 F.3d 297 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018).

⁸⁰ *See Dassey v. Dittman*, 877 F.3d 297, 318 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018).

⁸¹ *See id.* at 314 (citing *Johnson v. Williams*, 568 U.S. 289, 300 (2013)). Pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA):

[A] writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Psychological coercion, questions to which the police furnished the answers, and ghoulish games of “20 Questions,” in which Brendan Dassey guessed over and over again before he landed on the “correct” story (*i.e.*, the one the police wanted), led to the “confession” that furnished the only serious evidence supporting his murder conviction in the Wisconsin courts.⁸²

The Supreme Court denied certiorari on June 25, 2018.⁸³

II. WHY A SPEECH-LANGUAGE PATHOLOGIST?

An unusual feature of this project is that it pairs a law professor with a speech-language pathologist (SLP), a profession not commonly seen, or well understood, in the criminal or juvenile justice systems. While it is fairly well known that SLPs are the professionals who work with children who have difficulties with s’s, l’s and r’s, or who stutter, people unfamiliar with the field may be surprised at the full breadth of SLPs’ professional activities, expertise, and services.⁸⁴ The full scope of practice includes *all aspects of communication, across the full lifespan* from infants, toddlers, pre-school and school-age children, and adolescents, to adults of all ages.⁸⁵ Language development and disorders have long been primary areas of expertise for SLPs, and “[n]o other profession holds this expertise.”⁸⁶

SLPs work predominantly with clients who have delays or disorders many of which occur, as with Brendan, developmentally (*i.e.*, not the result of illness or trauma).⁸⁷ SLPs provide screening and discourse analysis to identify potential communication problems, full-scale evaluation and diagnosis, intervention/therapy services, counseling, and education for clients and their families, educators and other providers.⁸⁸

⁸² *Dassey*, 877 F.3d at 319 (Wood, C.J., Rovner, J., Williams, J., dissenting).

⁸³ *See Dassey v. Dittman*, 138 S. Ct. 2677 (2018) (mem.).

⁸⁴ *See Speech-Language Pathologists: About Speech-Language Pathology*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <https://www.asha.org/Students/Speech-Language-Pathologists/#careers> (last visited Feb. 25, 2019).

⁸⁵ *See id.*

⁸⁶ Marilyn A. Nippold, Professor, Univ. of Or., Language Sampling with Adolescents: Implications for School Success, Presentation at the American Speech-Language-Hearing Association Convention (Nov. 20, 2008), https://www.asha.org/Events/conventions/2008/1037_Nippold_Marilyn.

⁸⁷ *See* AM. SPEECH-LANGUAGE-HEARING ASS’N, SPEECH-LANGUAGE PATHOLOGY MEDICAL REVIEW GUIDELINES 10 (2015), <https://www.asha.org/uploadedfiles/slp-medical-review-guidelines.pdf>.

⁸⁸ *See Speech-Language Pathologists: About Speech-Language Pathology*, *supra* note 84.

In other words, an SLP is well-suited for involvement in criminal cases where a juvenile or adult has a suspected, or already diagnosed, language deficit. Just like Sherlock Holmes, a good SLP's business is "to know what other people don't know"⁸⁹ and to *observe what others cannot see*. A good SLP will see under the surface into the underlying interconnected complexities of the communication and cognitive systems and understand the significance of developmental processes.

Seeing beneath the surface is especially important in this case, because so much was decided, or overlooked, based on the *appearance* of things. Brendan *appeared* to be functioning well in the interview; he *appeared* to understand; he *appeared* to agree to so much of what the police said.⁹⁰ The police *appeared* to be calm, *appeared to be* gentle, and *appeared to be* just asking the kid some questions as he sat on a comfortable couch.⁹¹ No one bothered to go under the hood because they thought they knew; they thought they could rely on common sense, but they did not recognize their own ignorance. They clearly did not know that their common sense would not serve in this situation. Once again, Sherlock says it best: "You did not know where to look, and so you missed all that was important."⁹²

Unlike many forensic psychologists who address mental and behavioral functioning,⁹³ an SLP is trained to go beyond generalities about communication problems and can correct the kind of misconceptions that occurred in this case. An SLP can provide a detailed description of the deficits, whether it is processing, verbal memory, or narrative, and what those deficits mean in actual communication situations.⁹⁴ The SLP can offer insights about an

⁸⁹ 2 ARTHUR CONAN DOYLE, *The Adventure of the Blue Carbuncle*, in THE ADVENTURES OF SHERLOCK HOLMES 153, 170 (1904).

⁹⁰ See, e.g., *Dassey v. Dittman*, 877 F.3d 297, 307 (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2677 (2018) (providing an example of Brendan nodding in agreement to what the police officers said).

⁹¹ See *id.* at 306.

⁹² 2 A. CONAN DOYLE, *A Case of Identity*, in THE ADVENTURES OF SHERLOCK HOLMES, *supra* note 89, at 56, 66.

⁹³ For example, Brendan was evaluated by Dr. Robert Gordon who found that Brendan was very passive, fearful of social situations, and highly suggestible. See Trial Exhibit 231, State v. Dassey, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007) (Letter from Robert H. Gordon, Ph.D., Licensed Psychologist, Forensic Psych Associates, Ltd., to Mark R. Fremgen, Kindt Phillips Friedman & Fremgen, S.C. (Nov. 15, 2006)), <http://www.stevenavercase.org/wp-content/uploads/2016/01/Trial-Exhibit-231-Brendan-Dassey-Psych-Evaluation-11-10-2006.pdf>. There was no discussion of Brendan's communication issues, though his personality and behavioral characteristics are consistent with Brendan's severe language deficits. See *id.*

⁹⁴ See, e.g., Hugh W. Catts & Alan G. Kamhi, *Relationship Between Reading and Language Disorders: Implications for the Speech-Language Pathologist*, 8 SEMINARS SPEECH & LANGUAGE 377, 384 (1987); *About Communication Deficits*, AEGIS THERAPIES, <https://aegistherapies.com/c>

individual's non-verbal communication and the connection between an individual's language deficits and behavior.⁹⁵ Equally important, the SLP can analyze the communication of other persons who interacted with the impaired individual.⁹⁶ This can be critical when, as here, the verbal and non-verbal communication of the other people in the conversation—i.e., law enforcement—matters as much as the communication of the impaired person.

III. LANGUAGE IMPAIRMENTS: A PRIMER

That Brendan had a severe language impairment that profoundly interfered with his functioning is incontrovertible.⁹⁷ Unfortunately, few people in the Manitowoc County Courthouse seemed to have even noticed. To be fair, Manitowoc is hardly unique. We therefore feel that an overview of language impairments is in order before turning to Brendan.

A. *Language Impairments: What Are They?*

Language is an organized system governed by rules and conventions that speakers follow without knowing it.⁹⁸ Language is a powerful tool comprised of three large domains: form, meaning, and use.⁹⁹ It has a significant non-verbal dimension and integrates cognitive systems such as attention, memory, problem solving, executive functioning, and social-emotional skills.¹⁰⁰ Despite all of its power, however, the process of acquiring language in early childhood can be easily disrupted by a number of physiological, psychological, and environmental forces.¹⁰¹ When that happens, the resulting

onditions/communication-deficits/ (last visited Feb. 25, 2019).

⁹⁵ See AM. SPEECH-LANGUAGE-HEARING ASS'N, SCOPE OF PRACTICE IN SPEECH-LANGUAGE PATHOLOGY (2016), <https://www.asha.org/uploadedFiles/SP2016-00343.pdf>.

⁹⁶ See *Speech-Language Pathologists About Speech-Language Pathology*, *supra* note 84.

⁹⁷ *Dassey v. Dittman*, 860 F.3d 933, 972 (7th Cir. 2017) (describing Brendan's characteristics and limitations), *reh'g en banc granted*, *opinion vacated* (Aug. 4, 2017), *on reh'g en banc*, 877 F.3d 297 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 267 (2018).

⁹⁸ See *Introduction to Language*, LUMEN LEARNING, <https://courses.lumenlearning.com/boundless-psychology/chapter/introduction-to-language/> (last visited Feb. 25, 2019).

⁹⁹ See *Form, Meaning, and Use*, REALGRAMMAR, <https://www.realgrammar.com/form-meaning-use/> (last visited Feb. 25, 2019).

¹⁰⁰ See HANNAH COLES ET AL., THE ROYAL COLLEGE OF SPEECH & LANGUAGE THERAPISTS: JUSTICE EVIDENCE BASE CONSOLIDATION: 2017 4 (2017), <http://www.rcslt.org/-/media/Project/RCSLT/justice-evidence-base2017-1.pdf>; Gladys P. Knott, *Nonverbal Communication During Early Childhood*, 18 THEOREY INTO PRAC. 226, 226 (1979).

¹⁰¹ See, e.g., LaVigne & Van Rybroek, *supra* note 18, at 49, 51.

impairment can be devastating and life-long.¹⁰²

The term “language impairment” (also known as “language disorder”)¹⁰³ generally refers to deficiencies in language competency. It encompasses weaknesses in three realms of spoken language—expressive, receptive, and pragmatic.¹⁰⁴

Expressive and receptive (comprehension) deficits affect vocabulary, syntax, semantics, and processing.¹⁰⁵ These skills are directly related to the ability to decipher meaning and to adequately recall and relate information.¹⁰⁶ According to the Royal College of Speech and Language Therapists (U.K.), lack of these vital communication skills “results in poor knowledge, processing and application of culturally relevant and often quite subtle behavior that assists in establishing and maintaining relationships of varying degrees of complexity.”¹⁰⁷

Pragmatic deficits relate to “the behavioral effects[] of communication.”¹⁰⁸ Deficiencies in this aspect of language reveal themselves in “a lack of social cognition, an inability to take the perspective of the other person, and a failure to appropriately adapt

¹⁰² See *id.* at 48–49.

¹⁰³ We use the term “language impairment” because that is the term used in the school SLP’s language evaluation report. See Trial Exhibit 219, *supra* note 19. Many different terms are in use currently, such as developmental language disorder, communication disorder, language delay, and specific language impairment, to name just a few. Recently, there has been an effort to reach a consensus on terminology. The debate is ongoing among clinicians and researchers and there is much disagreement. See, e.g., Dorothy V.M. Bishop et al., *Phase 2 of CATALISE: A Multinational and Multidisciplinary Delphi Consensus Study of Problems with Language Development: Terminology*, 58 J. CHILD PSYCHOL. & PSYCHIATRY 1068, 1068–71 (2017); Courtenay Frazier Norbury & Edmund Sonuga-Barke, *New Frontiers in the Scientific Study of Developmental Language Disorders*, 58 J. CHILD PSYCHOL. & PSYCHIATRY 1065 (2017); see also Nancy Volkers, *Diverging Views on Language Disorders: Part One of Two*, ASHA LEADER, Dec. 1, 2018, at 47, 48, 50 (arguing the term specific language impairment (SLI) should be abandoned for developmental language disorder (DLD)).

¹⁰⁴ Language impairments also exist among users of signed languages. See Michele LaVigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 853, 856 (2003). However, because Brendan is hearing, and uses spoken language, and because the vast majority of linguistically impaired individuals in the criminal justice system are also hearing and use spoken language, we refer to oral and spoken language competency.

¹⁰⁵ These are tested in part by standardized instruments. See LaVigne & Van Rybroek, *supra* note 17, at 74; see also STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 380 (2007) (discussing expressive communication’s value in social settings).

¹⁰⁶ See LaVigne & Van Rybroek, *supra* note 17, at 75–76.

¹⁰⁷ See COLES ET AL., *supra* note 100, at 5.

¹⁰⁸ LaVigne & Van Rybroek, *supra* note 17, at 75 (alteration in original); see also Robert L. Russell, *Social Communication Impairments: Pragmatics*, 54 PEDIATRIC CLINICS N. AM. 483, 484 (2007) (“[Pragmatics can be defined as] the communicative use of language and gesture in context . . .”).

in interactions.”¹⁰⁹ Individuals with pragmatic issues often lack “the ability to accurately process a face to face interaction . . . [and have difficulty] processing non-verbal content as well as verbal content.”¹¹⁰

Developmental language impairments are the result of disruption in a child’s language acquisition process. The causes can be an underlying communication disorder such as hearing loss, auditory processing disorder, an underlying cognitive deficit, or external conditions such as extreme poverty, trauma, abuse or neglect.¹¹¹ Language impairments will also co-occur with associated disorders such as ADHD, learning disability, or pervasive developmental disorder.¹¹²

Language impairments rarely exist in isolation. Because language is so essential to human functioning, communication deficits invariably give rise to cognitive, social, academic, behavioral, and/or emotional difficulties.¹¹³ Any one of these can have a profound influence on an individual’s ability to effectively navigate through life, even after the individual has acquired enough language to get by in daily living or to appear “normal.”¹¹⁴ In fact, although language impairment is often classified as a childhood disorder, a child does not grow out of it. The effects and deficits will typically continue into late adolescence and adulthood.¹¹⁵

B. Language Impairments in the Justice System

It should come as no surprise that people with language

¹⁰⁹ LaVigne & Van Rybroek, *supra* note 17, at 75.

¹¹⁰ COLES ET AL., *supra* note 100, at 5.

¹¹¹ See LaVigne & Van Rybroek, *supra* note 17, at 75–76.

¹¹² See *id.* at 76.

¹¹³ See Johnson et al., *supra* note 17, at 52; LaVigne & Van Rybroek, *supra* note 18, at 55.

¹¹⁴ See LaVigne & Van Rybroek, *supra* note 17, at 77, 78; Pamela Snow & Martine Powell, *Youth (In)justice: Oral Language Competence in Early Life and Risk for Engagement in Antisocial Behaviour in Adolescence* 3 (Australian Inst. of Criminology, Trends & Issues in Crime & Crim. Just. No. 435, 2012) [hereinafter Snow & Powell, *Youth (In)justice*]; see also Pamela C. Snow & Martine B. Powell, *What’s the Story? An Exploration of Narrative Language Abilities in Male Juvenile Offenders*, 11 PSYCHOL., CRIME & L. 239, 239–240 (2005) [hereinafter Snow & Powell, *What’s the Story?*] (discussing an association between juvenile delinquency and poor language abilities).

¹¹⁵ See LaVigne & Van Rybroek, *supra* note 18, at 42. For excellent examples of longitudinal studies that track individuals with language impairments, see Joseph H. Beitchman et al., *Fourteen-Year Follow-up of Speech/Language-Impaired and Control Children: Psychiatric Outcome*, 40 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 75, 82 (2001); Joseph H. Beitchman et al., *Long-Term Consistency in Speech/Language Profiles: I. Development and Academic Outcomes*, 35 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 804, 805, 809 (1996); Joseph H. Beitchman et al., *Long-Term Consistency in Speech/Language Profiles: II. Behavioral, Emotional, and Social Outcomes*, 35 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 815, 821 (1996).

impairments do not fare well in the criminal or juvenile justice systems.¹¹⁶ In a previous article, co-author Michele LaVigne described the many collateral consequences of language impairment that impede, or even destroy, an individual's ability to receive due process and effectively participate in the criminal justice system, whether it be working with counsel or facing a high-stakes interrogation.¹¹⁷ The list is long: poor vocabulary; difficulty processing complex sentences and paragraph length utterances; deficient auditory memory; poor narrative skills; inability to grasp inferences; lack of background knowledge; difficulty learning new material; and limited ability to seek clarification.¹¹⁸

This is not to suggest that every person with a language impairment will be disabled or disadvantaged in all aspects of communication. Nor will the deficits necessarily be readily apparent or recognizable, as will be discussed below. Nevertheless, there is no question that language impairments or disorders can, and do, strike directly at the heart of justice for the impaired individuals who come into juvenile or criminal court.¹¹⁹

The effects of language impairments take on even greater urgency when we consider that individuals with language impairments are arrested, convicted, and incarcerated at rates well beyond the impairment rates found in the general population.¹²⁰ Language impairments occur in approximately 7% of the population,¹²¹ but

¹¹⁶ See LaVigne & Van Rybroek, *supra* note 18, at 43–44.

¹¹⁷ See *id.* at 66.

¹¹⁸ LaVigne & Van Rybroek, *supra* note 17, at 77–78; see LaVigne & Van Rybroek, *supra* note 18, at 43–44; Gerard H. Poll et al., *Identification of Clinical Makers of Specific Language Impairments in Adults*, 53 J. SPEECH, LANGUAGE, & HEARING RES. 414, 417–19 (2010); Pamela C. Snow & Martine B. Powell, *Oral Language Competence, Social Skills and High-Risk Boys: What Are Juvenile Offenders Trying to Tell Us?*, 22 CHILD. & SOC'Y 16, 22, 24 (2008).

¹¹⁹ See LaVigne & Van Rybroek, *supra* note 18, at 42.

¹²⁰ See COLES ET AL., *supra* note 100, at 13–16 tbl.; Theresa A. Belenchia & Thomas A. Crowe, *Prevalence of Speech and Hearing Disorders in a State Penitentiary Population*, 16 J. COMM. DISORDERS 279, 281–83 (1983) (finding higher rates of voice and hearing disorders in the incarcerated population than in the general population); Nicholas Bountress & Jacqueline Richards, *Speech, Language and Hearing Disorders in an Adult Penal Population*, 44 J. SPEECH & HEARING DISORDERS 293, 298 (1979) (finding a high incidence of deficient language skills in an adult male prison population); Davis et al., *supra* note 18, at 252 (indicating that between 58% to 84% of institutionalized delinquents had language and communication difficulties); LaVigne & Van Rybroek, *supra* note 17, at 70–71; Dixie Sanger et al., *Prevalence of Language Problems Among Adolescent Delinquents: A Closer Look*, 23 COMM. DISORDERS Q. 17, 23 (2001) (explaining that 19.4% of female juvenile delinquents studied qualified for language services); Snow & Powell, *supra* note 118, at 22 (indicating that 52% of young male offenders studied had a language impairment); Cynthia Olson Wagner et al., *Communicative Disorders in a Group of Adult Female Offenders*, 16 J. COMM. DISORDERS 269, 274 (1983) (revealing that 44% of incarcerated women studied had some form of speech-language deficiency).

¹²¹ COLES ET AL., *supra* note 100, at 6–8.

studies of juvenile and adult correctional facilities in the United States and the U.K. have found rates of language impairment that are *three to ten times* higher.¹²² British researchers have estimated that 50-60% of young offenders (21 or younger) have “speech, language and communication needs.”¹²³ Two studies of adolescent boys charged with “homicidal behavior” (attempted or completed homicides) in New York and Florida found that *every one* of them had a diagnosable “language disorder and all scored well below their actual age[s] in language” measures.¹²⁴

C. *Why Don't We Know This?*

So, if language impairments can be so devastating to human development and have the potential to wreak havoc on due process, and if so many of the people who cycle through our criminal and juvenile justice systems have these impairments, why don't we know about this? Why are language impairments not common knowledge among criminal and juvenile law professionals? And in the context of Brendan's case, why did the police, pre-trial counsel, and the judge not know that he suffered from a severe multi-faceted language impairment that reached the level of disability? Especially when the documentation of the impairment was right in front of their faces? That, as they say, is the million-dollar question. And, as is true for so many high-priced questions, the answer is complicated.

The legal profession is not alone in its ignorance of language impairments. Despite decades of robust research, language impairments still remain relatively unknown outside of the speech-language profession, especially in the United States.¹²⁵ And, despite the fact that language impairments occur more frequently than other

¹²² See *supra* note 120. See also LaVigne & Van Rybroek, *supra* note 18, at 93–94 (finding the rate of diagnosed learning disabilities is almost three times more than general public); Kathryn Stone & Karen Bryan, *Unlocking the Evidence*, COUNS. MAG. (Oct. 2010), <https://www.counsmagazine.co.uk/articles/unlocking-the-evidence> (finding that at least 60% of young offenders have communications difficulties).

¹²³ Juliette Gregory & Karen Bryan, *Speech and Language Therapy Intervention with a Group of Persistent and Prolific Young Offenders in a Non-Custodial Setting with Previously Undiagnosed Speech, Language and Communication Difficulties*, 46 INT'L J. LANGUAGE COMM. DISORDERS 202, 203 (2011).

¹²⁴ LaVigne & Van Rybroek, *supra* note 18, at 95–96; see Charles H. King, *The Ego and the Integration of Violence in Homicidal Youth*, 45 AM. J. ORTHOPSYCHIATRY 134, 136 (1975) (studying adolescent boys with homicidal behavior in New York); Wade C. Myers & P. Jane Mutch, *Language Disorders in Disruptive Behavior Disordered Homicidal Youth*, 37 J. FORENSIC SCI. 919, 921 (1992) (studying adolescent boys with homicidal behavior in Florida)

¹²⁵ The bulk of research on the subject comes from Canada, Australia, and the U.K. See COLES ET AL., *supra* note 100, at 13–16 tbl.

well-known disorders, there is little public awareness.¹²⁶ A common refrain among speech-language professionals is that language impairments are the most common childhood disorder the public has never heard of.¹²⁷

One of the primary reasons for this anonymity is that language impairments are hidden.¹²⁸ Unless an individual also has an articulation (speech production) disorder, language impairment will often not look like anything we recognize as a disorder. Instead, the impaired individual may appear as a person of few words—or odd words. And, this may be accompanied by excessive passivity, reluctance, or abruptness,¹²⁹ which will simply be written off as personality traits. Or in many instances, as a behavior problem.¹³⁰ Meanwhile, as an impaired child grows into adolescence and adulthood, he or she will learn to “pass” by developing techniques for masking communication deficits.¹³¹

It is also likely that the general public and the legal profession never paid attention to language impairments because we never had to. For most of us, especially the verbal types drawn to law, language simply showed up. Language is, as linguist Noam Chomsky put it, “something that happens to you; it’s not something you do.”¹³² But, while that may make our lack of awareness understandable, it does not mitigate the harm caused by that ignorance.

IV. THE SCIENCE OF INTERVIEWING

Another area of profound ignorance among the players in Brendan’s case was the science of interviewing. From looking at the record, it appears that law enforcement, pre-trial counsel, and the judge knew that open-ended questions were good and leading

¹²⁶ See Courtenay Norbury, *Developmental Language Disorder: The Most Common Childhood Condition You’ve Never Heard Of*, GUARDIAN (Sept. 22, 2017), <https://www.theguardian.com/science/head-quarters/2017/sep/22/developmental-language-disorder-the-most-common-childhood-condition-youve-never-heard-of>.

¹²⁷ See, e.g., *id.*

¹²⁸ See Clare Francis, *Language Impairment – the “Hidden” Learning Disability*, MOD. SPEECHIE (June 2, 2015), <https://www.modernspeechie.com.au/language-impairment-the-hidden-learning-disability/>.

¹²⁹ See LaVigne & Van Rybroek, *supra* note 17, at 78.

¹³⁰ See Deborah Moncrieff et al., *Screening Tests Reveal High Risk Among Adjudicated Adolescents of Auditory Processing and Language Disorders*, 61 J. SPEECH, LANGUAGE, & HEARING RES. 924, 932 (2018).

¹³¹ See LaVigne & Van Rybroek, *supra* note 17, at 78; Snow & Powell, *What’s the Story?*, *supra* note 114, at 248; Snow & Powell, *Youth (In)Justice*, *supra* note 114, at 2.

¹³² NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 173–74 (1988).

questions were bad, but they had courtroom notions of open-ended and leading questions. Beyond that, no one seemed to appreciate the complicated dynamics of interviewing, especially of an adolescent with a severe language disability. That lack of understanding followed Brendan up through the en banc panel in Chicago and played a major role in the way the case turned out. For that reason, we believe that an overview of interviewing principles is as essential as the discussion of language impairments.

A. General Principles and Best Practices

Interviewing is a multi-faceted subject that commands its own graduate-level courses. As we will discuss below, decades of research have produced consensus about best practices for interviewing an impaired juvenile like Brendan, or for that matter, anybody. When we analyzed the interviews with Brendan, we did so through the lens of those best-practices.

Interviewing is sophisticated, complicated business that requires specialized training, knowledge, practice, and ongoing review and assessment.¹³³ The interview is a critical tool for professionals in a number of fields—medical, therapeutic/clinical, *and* forensic—all of which recognize that a well-done interview is essential to case success, and that a poorly done interview is a recipe for disaster.¹³⁴ Extensive research has resulted in recommendations for evidence-based best-practices that are similar across professions, including law enforcement.¹³⁵ These practices reflect the recognition that interviewers' behavior and language have a direct effect on the

¹³³ See Peter R. Lichstein, *The Medical Interview*, in CLINICAL METHODS: THE HISTORY, PHYSICAL, AND LABORATORY EXAMINATIONS 29, 29 (Henry Kenneth Walker et al. eds., 3rd rev. ed. 1990); DEBRA ANN POOLE, INTERVIEWING CHILDREN: THE SCIENCE OF CONVERSATION IN FORENSIC CONTEXTS 179–86 (2016); Michael E. Lamb et al., *A Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201, 1209 (2007).

¹³⁴ See Lichstein, *supra* note 133, at 29 (emphasizing that the medical interview is a physician's most versatile and therapeutic tool); Karyn Dayle Jones, *The Unstructured Clinical Interview*, 88 J. COUNSELING & DEV. 220, 220 (2010) (stressing that the clinical interview is the primary assessment tool for diagnosing mental disorders); *What Is Forensic Interviewing?*, CHILD. SERVS. PRAC. NOTES (Jordan Inst. for Fams.), Dec. 2002, http://www.practicenotes.org/vol8_no1/what_is.htm (explaining that the forensic interview is the first step in child protective services investigations).

¹³⁵ See, e.g., Heather Stewart et al., *Training Forensic Interviewers*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 199, 200 (Michael E. Lamb et al. eds., 2d ed. 2011); Pauline T. Flynn, *Effective Clinical Interviewing: Language Speech and Hearing Services in Schools*, 9 LANGUAGE, SPEECH, & HEARING SERVS. SCHS. 265, 265–66 (1978); Lamb et al., *supra* note 133, at 1204–05, 1209.

interviewee's language and thus on quality of the information provided.¹³⁶ Experts have identified verbal behaviors that elicit the most accurate and complete content possible¹³⁷ on the one hand, and on the other, behaviors to be avoided because they are contaminating, suggestive, and/or narrow the interview's focus too early in the process.¹³⁸

When the person being interviewed is a child or an individual with any kind of cognitive or developmental delay, the need for best-practices becomes even more urgent. Because of their underdeveloped language skills, these individuals are at greater risk for providing inaccurate information in response to memory cues or prompts.¹³⁹ This, coupled with well-documented desire to say what they think the interviewer wants to hear makes interviews with these individuals both high-risk and high-stakes.¹⁴⁰ The risk is further complicated by the malleable nature of memory,¹⁴¹ i.e., memories can be "updated" each time they are accessed.¹⁴² If memories are repeatedly accessed by inappropriate or carelessly executed verbal prompts, they can be easily corrupted.¹⁴³

The first step to an accurate interview with any type of vulnerable individual happens before the interview ever starts. Pre-interview preparation and information gathering about the person to be interviewed are imperative.¹⁴⁴ Speaking with teachers or parents and accessing records inform the interviewer about potential conditions that may affect participation in an interview.¹⁴⁵

¹³⁶ This is part of speech language pathologists' training. See, e.g., GERALYN R. TIMLER, *Using Language Sample Analysis to Assess Pragmatic Skills in School-Age Children and Adolescents*, PERSP. ASHA SPECIAL INT. GROUPS, Jan. 2018, at 23, 31. It is also the basis for research studying effective interviewing with children by Lamb and colleagues in four different countries. See, e.g., Lucy A. Henry et al., *Children with Intellectual Disabilities and Developmental Disorders*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE, *supra* note 135, at 255, 261; Lamb et al., *supra* note 133, at 1204–05.

¹³⁷ See LICHSTEIN, *supra* note 133, at 31; Yael Orbach & Margaret-Ellen Pipe, *Investigating Substantive Issues*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE, *supra* note 135, at 149, 150–51, 158.

¹³⁸ See LICHSTEIN, *supra* note 133, at 31; Orbach & Pipe, *supra* note 137, at 159–60.

¹³⁹ See POOLE, *supra* note 133, at 15.

¹⁴⁰ See *id.* at 14–15; Sarah E. Agnew & Martine B. Powell, *The Effect of Intellectual Disability on Children's Recall of an Event Across Different Question Types*, 28 L. & HUM. BEHAV. 273, 289 (2004).

¹⁴¹ See Elizabeth Loftus, *The Malleability of Human Memory: Information Introduced After We View an Incident Can Transform Memory*, 67 AM. SCIENTIST 312, 312 (1979).

¹⁴² POOLE, *supra* note 133, at 15.

¹⁴³ See POOLE, *supra* note 133, at 16.

¹⁴⁴ See U.S. DEPT. OF JUST., VICTIMS WITH DISABILITIES: THE FORENSIC INTERVIEW 11 (rev. ed. 2011), <https://www.ovc.gov/publications/infores/pdfxt/VictimsGuideBook.pdf>.

¹⁴⁵ See *id.*; Christina Rainville, *Best Practices for Interviewing Children with Disabilities*,

The interview itself is ideally conducted as soon as possible after the event,¹⁴⁶ and in a distraction-free, comfortable environment.¹⁴⁷ The interviewer begins by establishing *genuine* rapport.¹⁴⁸

The next phase, known as information elicitation, is the heart of the interview. This is the place where adherence to the evidence-based procedure is essential. Interviews conducted systematically, adhering to the procedure, and with an understanding of language use and its reciprocal nature, produce information that is substantially more reliable and complete.¹⁴⁹

One of the keys to a good interview is the interviewer's understanding of the kind of communication she should aim for, both from herself and the person being interviewed.¹⁵⁰ In an information-seeking interview, the interviewer's role is to encourage the interviewee to provide information in the form of freely recalled narratives.¹⁵¹ A *narrative* is an account of events occurring over time; minimally, a narrative can take the form of a single complex sentence¹⁵² or several simple consecutive utterances.¹⁵³ A narrative that is *freely recalled* unfolds "in the most unbiased, uninfluenced way possible."¹⁵⁴ It is not suggested or directed by another person. The person who experienced it tells the story.¹⁵⁵

As would be expected, questions are the tools of the professional interviewer, but not all questions are created equal. Interviewers need an awareness of the characteristics of questions and how to

AM. B. ASS'N (Dec. 20, 2017), https://www.americanbar.org/groups/child_law/resources/child_law_w_practiceonline/child_law_practice/vol_31/may_2012/best_practices_forinterviewingchildrenwithdisabilities/.

¹⁴⁶ See Lamb et al., *supra* note 133, at 1203.

¹⁴⁷ An optimal furniture arrangement allows eye contact as well as looking away during times when one is recalling events and formulating thoughts. See Flynn, *supra* note 135, at 266.

¹⁴⁸ See Irit Hershkowitz et al., *Interviewing Youthful Suspects in Alleged Sex Crimes: A Descriptive Analysis*, 28 CHILD ABUSE & NEGLECT 423, 424 (2004).

¹⁴⁹ See, e.g., Rainville, *supra* note 145.

¹⁵⁰ See U.S. DEP'T OF JUST., *supra* note 144, at 12.

¹⁵¹ See CHRISTOPHER D. HOFFMAN, INT'L FOUND. FOR PROT. OFFICERS, INVESTIGATIVE INTERVIEWING: STRATEGIES AND TECHNIQUES 1 (2005), <https://www.ifpo.org/wp-content/uploads/2013/08/interviewing.pdf>.

¹⁵² See LaVigne & Van Rybroek, *supra* note 17, at 88, 106–07; see also Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 6–7 (2001) (explaining the psychodrama method for trial attorneys, which requires attorneys to explain the facts on an emotional level).

¹⁵³ See, e.g., February Interview, *supra* note 21 ("I got off the bus at 3:45 and I walked, I seen a jeep down by our house and I went into my house and I played Playstation 2 for two hour, three hours.")

¹⁵⁴ See Flynn, *supra* note 135, at 268.

¹⁵⁵ See Lamb et al., *supra* note 133, at 1203; Snow & Powell, *Youth (In)justice*, *supra* note 114, at 2.

sequence them.¹⁵⁶ Certain questions or the repeated use of particular types of questions may have effects that the interviewer does not intend such as introducing inaccuracies or omitting important content.¹⁵⁷

Experts universally agree that open-ended questions are the best tool for eliciting narrative.¹⁵⁸ *Open-ended questions* consist of little or no content and carry the least risk of contamination.¹⁵⁹ They may indicate a general topic or time period as in “Tell me what happened.” “Tell me what happened on x date or at x place.” It is important to note that these open-ended questions are *not* the same as the questions that lawyers and judges typically think of as open-ended.¹⁶⁰

Open-ended questions should be used to start the interview and should continue as the most-used questions throughout.¹⁶¹ The value and utility of these questions may not be readily apparent, precisely because they contain so little content.¹⁶² However, “[a]s soon as the first narrative is completed, the interviewer” has obtained freely generated material and the interviewer can ask for elaboration by using follow-up open-ended questions such as “Tell more about x (what the child said).”¹⁶³

When open-ended questions are exhausted, other questions containing more content can be used, such as *wh-* questions. *Wh-Questions* are formulated using the words “who,” “what,” “where,” etc.¹⁶⁴ These questions have a narrow focus, such as a location or a person’s name, and can, if misplaced or overused, unintentionally elicit restricted and abbreviated responses. On the other hand, these questions are useful as follow-up.¹⁶⁵

Yes/No Questions, of all the question types, contain the most

¹⁵⁶ See Lamb et al., *supra* note 133, at 1203.

¹⁵⁷ See *id.*

¹⁵⁸ See Sarah E. Agnew et al., *An Examination of the Questioning Styles of Police Officers and Caregivers When Interviewing Children with Intellectual Disabilities*, 11 LEGAL & CRIMINOLOGICAL PSYCHOL. 35, 37 (2006).

¹⁵⁹ See Michael E. Lamb & Angèle Fauchier, *The Effects of Question Type on Self-Contradictions by Children in the Course of Forensic Interviews*, 15 APPLIED COGNITIVE PSYCHOL. 483, 483 (2001).

¹⁶⁰ See, e.g., Orbach & Pipe, *supra* note 137, at 154–55 (providing examples of open-ended questions in children interviews).

¹⁶¹ See Lamb & Fauchier, *supra* note 159, at 484.

¹⁶² It may appear as if the interviewer is doing nothing! But questions are not vehicles for the interviewers to express *themselves*, they are tools used to give the interviewee the floor. With this type of question, the interviewer steps back and allows the interviewee to talk in an unrestricted, undirected way.

¹⁶³ See Orbach & Pipe, *supra* note 137, at 154–55.

¹⁶⁴ *Wh-* questions too may be syntactically formulated as a question, e.g., ‘Where did you go after school?’ or as a statement/request such as ‘We need to know where you went after school.’

¹⁶⁵ See Orbach & Pipe, *supra* note 137, at 155; Lamb & Fauchier, *supra* note 159, at 489.

content and carry the greatest risk of introducing content that the interviewee has not mentioned.¹⁶⁶ Generally speaking, yes/no questions contain all the content that a declarative sentence contains. For example, “Did you go home after school?” contains the same content as the statement “you went home after school,” and adds a demand for confirmation or denial.

Multiple-choice questions are never acceptable.¹⁶⁷ Ever. They are problematic for a number of reasons, and there is no productive use for these.¹⁶⁸ The interviewee may interpret these as a *forced choice* (even if “none of the above” is the correct answer),¹⁶⁹ or may select an inaccurate choice because they want to please the interviewer.¹⁷⁰

A visual representation of ideal proportions of question type and sequence would look something like a food pyramid, with open-ended questions (fruits and vegetables) leading the sequence and taking up almost two-thirds (Figure 1). Notice that yes/no questions are barely used, and there is no room whatsoever for multiple choice questions:

¹⁶⁶ See Orbach & Pipe, *supra* note 137, at, at 156–57

¹⁶⁷ See Gavin E. Oxbourgh et al., *The Question of Question Types in Police Interviews: A Review of the Literature from a Psychological and Linguistic Perspective*, 17 INT’L J. SPEECH, LANGUAGE & L. 45, 60 (2010).

¹⁶⁸ See *id.*

¹⁶⁹ An analogous example of forced choice can be seen in identification processes. In a consecutive photo line-up (i.e., sequential line-up), the witness views the suspect and fillers one at a time allowing the witness to answer “yes/no” to each individual viewed. In a simultaneous photo line-up, however, the suspect and fillers appear all at once. When a witness views a simultaneous line-up, (s)he is tempted to make a decision based on relative judgment by comparing one person to the next and choosing the “best” looking individual. See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 619, 625–26 (2006); see also WIS. DEPT’ OF JUST., OFFICE OF ATT’Y GEN., MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 4–5 (Apr. 1, 2010) (final draft), <https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf> (providing model policy and procedure for reliable eye-witness identification).

¹⁷⁰ See Oxbourgh et al., *supra* note 167, at 60.

Figure 1



Throughout the process, the interviewer must engage in a process of double awareness. Obviously, the interviewer should be looking for signs of confusion or discomfort in the person being interviewed,¹⁷¹ but like so much about interviewing, recognizing these signs is not simply a matter of common sense. An adolescent with a language impairment may have learned to cover his lack of understanding with behaviors that the untrained interviewer would see as evasion, reluctance, dishonesty, or bad attitude.¹⁷²

Meanwhile the interviewer must also be constantly aware of, and reflecting on, her own behavior.¹⁷³ Am I following the protocol? Am I consciously or unconsciously inserting content? What is the reaction of the interviewee? Am I encouraging the narrative or am I shutting it down? If so, how? And then the interviewer must adapt.

V. THE ANALYSIS: PROCESS AND METHODS

A. *The Beginning*

We started this project with a gut sense that there was more to the interrogations than met the courts' eyes or ears. Though we come from different professional backgrounds, our professional interests

¹⁷¹ See INGE SEBYAN BLACK & CHARLES L. YESCHKE, *THE ART OF INVESTIGATIVE INTERVIEWING* 32 (3d ed. 2014).

¹⁷² See Snow & Powell, *Youth (In)justice*, *supra* note 114, at 3.

¹⁷³ See, e.g., Stewart et al., *supra* note 135, at 201.

overlap on the subject of language impairments and their potential for great damage. We both believed that an in-depth speech-language perspective could shed additional light on a tragic situation.

The first step—confirming Brendan’s language impairment—was easy. Ordinarily we would have had no access to any diagnosis or test results that occurred outside of the litigation context,¹⁷⁴ and we would not presume to diagnose anybody from a TV show, but in this case the answer was hidden in plain sight—in the court record.

As a special education student, Brendan would have had an Individualized Education Plan (IEP) meeting at the beginning of every school year.¹⁷⁵ Those records, including a speech-language assessment conducted by the school SLP on September 22nd and September 27, 2005, were admitted into evidence at trial.¹⁷⁶ There was scant mention made of these records, especially the assessment, in the case, but as we will discuss below in Section VI, the scores and comments left no doubt that Brendan had a severe disability.¹⁷⁷

Meanwhile, we also obtained video or audio recordings of every interview or interrogation¹⁷⁸ through an open records request.¹⁷⁹ We reviewed them for critical information about non-verbal communication such as body language, tone of voice, and eye contact. We also reviewed them for intelligibility and significance to the case. Based on these reviews, we chose to have three interviews/

¹⁷⁴ Education records are confidential under the Family Educational Rights and Privacy Act (FERPA). See 20 U.S.C. §1232g(b)(1)-(2) (2012); 34 C.F.R. § 99.31 (2018).

¹⁷⁵ Cf. 20 U.S.C. § 1414(d)(4)(A) (2012) (“The local educational agency shall ensure that . . . the IEP Team . . . reviews the child’s IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved . . .”).

¹⁷⁶ See Trial Exhibit 218, State v. Dassey, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007) (Individualized Education Program from Mishicot Sch. Dist. for Brendan Dassey, Mishicot High Sch., Mishicot, Wis. (Sept. 29, 2005)), http://www.stevenaverycase.org/wp-content/uploads/2017/03/Dassey-Trial-Exhibit-218-IEP-9.29.2005_Redacted.pdf; Trial Exhibit 219, *supra* note 19; Trial Exhibit 220, State v. Dassey, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007) (Speech/Language Report from Amy A. LaFave on Brendan Dassey, Two Rivers, Wis. (Sept. 22 & Sept. 27, 2005)), http://www.stevenaverycase.org/wp-content/uploads/2017/03/Dassey-Trial-Exhibit-220-Evaluation-Report-By-Speech-and-Language-Pathologist_Redacted.pdf.

¹⁷⁷ See *infra* Section VI; see, e.g., Transcript of Trial (Day 1) at 74–77, State v. Dassey, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 16, 2007), https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/569329f40ab377deeda5f52/1452485112663/dassey_4_16_07.pdf (mentioning Brendan’s records).

¹⁷⁸ See WIS. STAT. § 938.195(2) (2018) (requiring law enforcement to record any custodial interrogation of a juvenile that is conducted at a place of detention).

¹⁷⁹ See WIS. STAT. § 19.35(1)(a) (2018); *Police Interviews and Interrogations and Audio Recordings*, STEVEN AVERY TRIAL TRANSCRIPTS & DOCUMENTS, <http://www.stevenaverycase.org/g/police-interviews-and-interrogations/> (last visited Feb. 1, 2019) (displaying video and audio recordings). Despite the fact that videos of the interrogations were available online, we still obtained DVD copies which were substantially higher quality.

interrogations transcribed: November 5, 2005, the second interview of February 27, 2006, and March 1, 2006.

B. Transcribing the Interviews

The interviews were transcribed verbatim by a trained experienced transcriber and entered into a computerized language analysis software program, Systematic Analysis of Language Transcripts program (SALT).¹⁸⁰ This is a tool that an SLP would ordinarily use to assess a client's communication issues.¹⁸¹ It is important to note that a language analysis transcription is not like a court transcript;¹⁸² it provides detailed, coded information about the verbal *and* non-verbal conduct of the speakers beyond the words that are spoken.¹⁸³ Here, the transcriber followed standard conventions, which include indicating pauses of two seconds or more, and marking grammatical elements, overlapping speech, word omissions and errors with code.¹⁸⁴ Prior to transcription we had observed that Brendan frequently responded non-verbally to police questions. We therefore requested additional coding to capture his gestures. When the process was complete, we were given a fully-coded transcription, which we used to generate our quantitative analyses.

C. Transcription Challenges: Law Enforcement

The transcriber faced considerable challenges transcribing the interviews, but not because of Brendan. Rather, the difficulty lay with the law enforcement officers, Wiegert and Fassbender. Both of them had speech that was rapid, with many run-on sentences and unfinished thoughts, making it difficult to interpret the thoughts

¹⁸⁰ See Jon F. Miller et al., *Transcribing Language Samples*, in *ASSESSING LANGUAGE PRODUCTION USING SALT SOFTWARE: A CLINICIAN'S GUIDE TO LANGUAGE SAMPLE ANALYSIS* 31, 34 (Jon F. Miller et al. eds., 2d ed. 2015).

¹⁸¹ See Jon F. Miller et al., *Tutorial: Using Language Sample Analysis to Assess Spoken Language Production in Adolescents*, 47 *LANGUAGE, SPEECH, & HEARING SERVS. SCHS.* 99, 99 (2016).

¹⁸² See *infra* apps. 2, 3, for examples of SALT transcriptions.

¹⁸³ See, e.g., *Summary of SALT Transcription Conventions*, SALT SOFTWARE, LLC 1 (rev. Dec. 2018), <https://www.saltsoftware.com/media/wysiwyg/tran aids/TranConvSummary.pdf>; see also *SALT Training: Self-Paced Online Courses*, SALT SOFTWARE, LLC 2, http://saltsoftware.com/media/wysiwyg/self-paced-training/SALT_Online_Training_Summary.pdf (last visited Feb. 28, 2019) (explaining that language analysis includes gestures, non-verbal turns, overlapping speech, parenthetical remarks, and other transcription conventions).

¹⁸⁴ See, e.g., Trial Exhibit 203, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 25, 2007) (Transcript of Interview by Marinette Cty. Detectives, with Brendan Dassey in Marinette Cty., Wis. (Nov. 6, 2005)), <http://www.stevenaverycase.org/wp-content/uploads/2016/03/Brendan-Dassey-Interview-Transcript-2005Nov06.pdf>.

expressed.¹⁸⁵ Even though the transcribers are masters-level speech-language professionals, they had a hard time determining the boundaries of the police's utterances (where one utterance ends and the next utterance begins)¹⁸⁶ because their utterances were so disorganized.¹⁸⁷ Wiegert and Fassbender's thoughts were expressed unclearly and at times incoherently.¹⁸⁸

Ordinarily, when the transcribers are transcribing an interaction with a child with an impairment and an adult professional, it is *the child with language impairment* whose language presents the transcriber with the greatest challenge, because the child's "intelligibility and prosody¹⁸⁹ may be impaired."¹⁹⁰ In this case, however, it was the *adult's* language that was the problem.¹⁹¹

D. Post-SALT Analysis

After the SALT process was completed, we took a deeper look. We paid particular attention to the February 27th and March 1st interviews since these immediately preceded the charges, and the March 1st interview was the primary evidence against Brendan (and the subject of twelve years of litigation).

¹⁸⁵ See, e.g., February Interview, *supra* note 21; March Interview, *supra* note 21.

¹⁸⁶ See March Interview, *supra* note 21. An utterance is a production of one or more words that may or may not contain a main clause and is often identified by a speaker's pauses or intonation; it may be a complete sentence, a fragment, a single word, or even a gesture. See Miller et al., *supra* note 180, at 35–36; Miller et al., *Analyzing Language Samples, in ASSESSING LANGUAGE PRODUCTION USING SALT SOFTWARE: A CLINICIAN'S GUIDE TO LANGUAGE SAMPLE ANALYSIS*, *supra* note 180, at 45. Clearly defined utterance boundaries allow for calculation of mean utterance length, which is a useful and widely used diagnostic measure of children's language development. Mean utterance length of adult speakers in interaction with children is a valuable measure as well, and may, among other things, indicate the quality and quantity of their language relative to the child's language level. Utterances segmentation is one of the most challenging decisions in any transcription process.

¹⁸⁷ See March Interview, *supra* note 21.

¹⁸⁸ See *id.*

¹⁸⁹ Prosody refers to the variations in loudness, pitch, and duration in spoken language. Rising and falling pitch help listeners distinguish between questions, exclamations, and declarative sentences. Prosody is sometimes called the "melody of language" and is used to supplement the meaning of utterances by, for example, signaling emphasis, "affect, sarcasm, empathy, or the relation one holds to the person or audience being addressed." Frank Boutsen, *Prosody: The Music of Language and Speech*, ASHA LEADER, Mar. 4, 2003, at 6–8.

¹⁹⁰ See FELICITY MEAKINS ET AL., UNDERSTANDING LINGUISTIC FIELDWORK § 9.4 (2018).

¹⁹¹ See March Interview, *supra* note 21, and *supra* text accompanying note 186–88, for a discussion on how the law enforcement officers' speech was difficult to interpret. In typical clinical and research contexts, the adults whose utterances are being recorded and transcribed in conversation with children with language impairment are often professionals skilled at monitoring both their own utterances and those of their partner simultaneously, and of controlling the pacing, complexity and clarity of their language. In many situations, the adult may follow loose guidelines, a protocol or even a script to aid them in maintaining these characteristics while eliciting children's language.

Our analysis first differentiated between true questions and utterances that have the grammatical form of questions but do not function as true questions. For example, “Why don’t you have a seat?” is a question functioning as a polite way to tell someone to be seated, without expectation of a reply. This type of utterance was not considered as a question for our analysis. On the other hand, some utterances function as questions but do not have the grammatical question form. Examples include requests such as: “Tell me more about that.” This type was coded as an open-ended question and included in the analysis. True questions were categorized and coded into the following types: open-ended, wh- questions, multiple choice, and three forms of yes/no questions.¹⁹²

As part of this analysis, we re-transcribed several passages to allow us to more accurately analyze the confounding nature of Wiegert and Fassbender’s language usage. Additionally, we counted other instances where law enforcement used tactics that compromised the integrity of the interview. These include speaking in paragraphs (i.e., four or more sentences or utterances in a turn), and asking three or more questions in rapid succession before giving Brendan an opportunity to answer.

Before we even began this project, it was obvious from viewing the interrogations that Wiegert and Fassbender’s methods of communicating with Brendan fell far below professional norms. Just how far below became painfully apparent when we examined our results.¹⁹³

VI. ABOUT BRENDAN DASSEY

A. *The Severity of His Language Impairment*

As we said earlier, determining whether Brendan had a language impairment, and the extent of his disability, was the easy part for us. The September 2005 Speech/Language Report conducted by an SLP for the Mishicot Schools was sitting in the court file, along with other school records from Brendan’s 2005 IEP meeting.¹⁹⁴

¹⁹² Some questions were ambiguous as to type. For example, “Do you remember when you went in the trailer?” is grammatically a yes/no question, but the police may have intended it to be taken as a wh- question such as “When did you go in the trailer?” In instances when the form was clear, but the intention was not, the grammatical form was used to determine the coding for question type.

¹⁹³ See *infra* Section VII and app. 1.

¹⁹⁴ See Trial Exhibit 218, *supra* note 176; Trial Exhibit 219, *supra* note 19; Trial Exhibit 220, *supra* note 176.

The test results and the ancillary records were unequivocal: Brendan had profound disabilities (speech-language impairment and language-based specific learning disability), that centered on his communicative, language, and interconnected cognitive functioning,¹⁹⁵ and those disabilities had been present probably since birth.¹⁹⁶

An individual's language skills are in part evaluated by means of specialized instruments administered and interpreted by an SLP.¹⁹⁷ In Brendan's case, the school SLP used a common assessment tool, the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4).¹⁹⁸

CELF-4 includes a series of subtests . . . that measure a variety of essential communicative [functions] such as auditory comprehension and recall, ability to follow directions, and comprehension of social rules. . . . CELF-4 [is] more finely tuned to the layers of language than measures [traditionally] relied on by courts such as Verbal IQ or clinical assessments.¹⁹⁹

¹⁹⁵ The deficits in Brendan's cognitive functioning appear to be centered in the verbal realm. See Transcript of Trial (Day 6), *supra* note 27, at 79–80. According to school records and the testimony of the school psychologist, Brendan scored in the average or low average range on Math measures. *Id.* at 90–92. See also Individuals with Disabilities Education Act (IDEA) Regulations, 34 C.F.R. § 300.8(c)(10) (2018) (“Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, [or] spell . . .”).

¹⁹⁶ See Trial Exhibit 219, *supra* note 19.

¹⁹⁷ See Teresa Paslawski, *The Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4): A Review*, 20 CANADIAN J. SCH. PSYCHOL. 129, 129, 132 (2005).

¹⁹⁸ See Trial Exhibit 220, *supra* note 176.

¹⁹⁹ LaVigne & Van Rybroek, *supra* note 17, at 78–79. According to Australian psychologist Pamela Snow, SLPs do not rely on Verbal IQ as a measure of language skill:

One problem is that verbal IQ represents . . . quite “static” skills, and . . . it is unrealistic to reduce a wide variety of complex sub-skills down to one score. SLPs think in a number of dimensions—receptive language (comprehension) [versus] expressive language, and also look at a number of aspects of language—phonology (use of the sounds system in one's language), semantics (vocabulary), syntax (sentence complexity), and pragmatics (the culturally determined set of social “rules” about how language is used). We . . . “dissect” language competence, which is why we use a number of different measures One of the most important composite skills is narrative language—the ability to apply a “template” that enables the logical sequencing of novel information for a listener who is [naive] about events. This has obvious forensic implications, but a verbal IQ score would only have a modest correlation with narrative skill.

The report of Brendan's scores is a devastating document. It makes clear that Brendan's overall impairment level was in the *most severe range*, and that at sixteen, he was *functioning like much a younger child*—test results ranged from five-years, eight-months to eleven-years, nine-months.²⁰⁰ His total language score placed him at the 1st percentile, indicating that 99% of kids his age understood and used language better than he did; most of them *much, much* better.²⁰¹ The chart below (Figure 2) shows Brendan's scores and the severity of his impairment (note: though not the same as IQ, CELF-4 uses the same metrics as an IQ test: 100 is the mean or age average; 85 is one standard deviation below the mean; 70 is two standard deviations below the mean):²⁰²

Figure 2

Impairment levels for standard scores and percentile rank from Brendan Dassey's Language Evaluation; CELF-4

Standard Score ¹	Severity Level of Impairment ¹	CELF subtests ²	Brendan's standard scores ³	Brendan's percentile rank ³
116+	No impairment/ above average	-	-	-
101-115	No impairment/ average	-	-	-
86-114	No impairment/average	-	-	-
78 – 85	Mild/marginal/borderline	-	-	-
70 – 77	Moderate/low range	Working Memory	75	5

Professor of Law, Univ. of Wis. Law Sch. (Aug. 11, 2011) (on file with co-author Michele LaVigne).

²⁰⁰ See Trial Exhibit 220, *supra* note 176.

²⁰¹ See *id.*

²⁰² See Angela Kinsella-Ritter, Consultant Speech Pathologist, Pearson Clinical & Talent Assessments, Interpreting Clinical Cases for Speech Pathologists: Understanding the Psychometrics of the Pearson Language Assessments: CLEF-4, CELF P-2 and PLS-5 (July 20, 2016) (Powerpoint presentation), <http://www.pearsonclinical.com.au/filemanager/uploads/Webinar%20Files/InterpretingCC1.pdf>.

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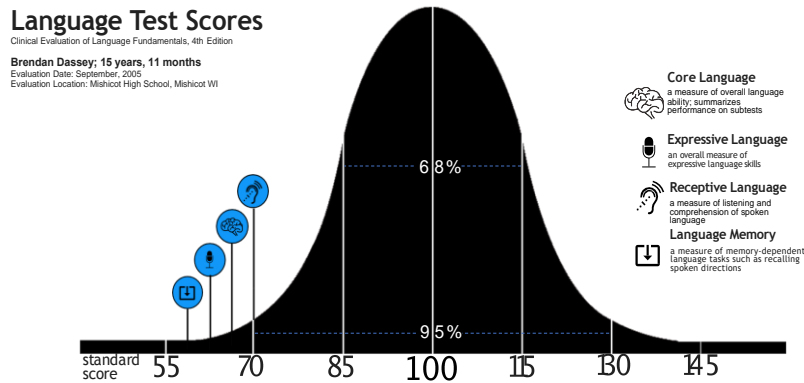
≤ 70	SEVERE/very low range	Core Language (total score)	66	1
		Reception	70	2
		Expression	63	1
		Content	70	2
		Memory	58	0.3

Table References:

- ¹ Angela Kinsella-Ritter (2016). "Interpreting Clinical Cases for Speech Pathologists: Understanding the psychometrics of the Pearson language assessments: CELF-4, CELF P-2 and PLS-5 "Adapted from the CELF-4 Examiner's Manual 2006, p. 118. Downloaded from the Internet July 25, 2018. www.pearsonclinical.com.au/filemanager/uploads/Webinar%20Files/InterpretingCC1.pdf.
- ² CELF-4 etc; Pearson etc.
- ³ Speech/Language Report, Mishicot Public Schools September 22, 27, 2005; Amy A. LaFave, MS CCC-SLP.

The bell curve below (Figure 3) shows Brendan's scores in relation to other sixteen-year-olds, with the scores of 95% of sixteen-year-olds falling between 70 and 130:

Figure 3



The report and the commentary from other school records identified difficulties at the most basic level, such as participating in classroom activities, initiating conversation and asking for clarification when confused.²⁰³ Brendan spoke at a low volume with little variation in pitch, and his body language, such as eye contact and gesture was “minimal,” yet another aspect of communication that he was unable to use.²⁰⁴ The list of Brendan’s “strengths” identified by the school SLP is telling; it was limited to three things: intelligible speech, willingness to participate, and knowledge of familiar routines.²⁰⁵

This is not to say that Brendan had no language or could not communicate at all. He had foundational language skills, but they were grossly underdeveloped.²⁰⁶ That means he would have trouble processing a lot of talk coming at him in any context.²⁰⁷ He would fatigue easily and become cognitively overloaded.²⁰⁸ This would hit him especially hard at school.²⁰⁹ Brendan would be the kid in the classroom who is always lost, always “not getting it.” His low scores on such tests as recalling sentences and understanding spoken paragraphs show he would struggle to process and recall even the most common forms of classroom communication, lectures, and multi-step directions. Learning new vocabulary and concepts would be slow and onerous. Brendan’s special education teacher took note of deficits in verbal memory which affected “all areas of language.”²¹⁰ Typical high school expectations such as taking notes, studying for tests, or taking exams would be beyond his reach without extraordinary assistance. Abstract spoken or written material, common at the high school level, would increase his comprehension difficulties. This is but a sample of the challenges that Brendan would have faced every day, year after year, during his school years and beyond.²¹¹

Reports from other teachers bear out the difficulties caused by

²⁰³ *See id.*

²⁰⁴ *See id.*

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ *See id.*

²⁰⁸ *See id.*

²⁰⁹ Brendan was acutely aware of this and reported his academic failures to policemen in the first interview on November 6, 2005, even though he was not asked directly about them. For example, Brendan: “My grades are bad though . . . Three F’s.” Trial Exhibit 203, *supra* note 184, at 43, 46.

²¹⁰ Transcript of Trial (Day 6), *supra* note 27, at 75.

²¹¹ *See* Vicki A. Reed, *Adolescents with Language Impairment*, in AN INTRODUCTION TO CHILDREN WITH LANGUAGE DISORDERS 169, 170–84 (Vicki A. Reed ed., 5th ed. 2018), for an overview of the characteristics of language impairment in adolescents and the impact on academic, social, economic, and personal life.

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Brendan's severe language deficit. While Brendan was in "regular classes" for some of the school day pursuant to federal law,²¹² this is not because he was capable of doing "regular" work.²¹³ He was hopelessly behind and was, at best, a passive observer.²¹⁴ The effect of Brendan's language impairment on his academic achievement was summarized this way:

Brendan continues to demonstrate delays in his basic reading and reading comprehension skills. Brendan demonstrates a delay in classroom achievement in these areas and in information processing deficit in the area of manipulation (difficulties summarizing and interpreting information, difficulties inferring information, difficulties understanding multiple contexts). Brendan continues to demonstrate significant delays in his receptive and expressive language skills, memory, vocabulary, sentence comprehension, pragmatics, and areas of abstract language Brendan's language delays impact him educationally and socially.²¹⁵

These types of poor language skills would also be felt outside of an academic setting.²¹⁶ His poor communication would interfere with establishing and maintaining interpersonal relationships.²¹⁷ The test scores show that his interactions would be compromised at the most basic levels: knowing how to participate in conversation; reading others' facial cues, tone of voice and body language. His scores on tests of figurative language and inference indicate his understanding of common elements of adolescent language such as slang and sarcasm,²¹⁸ would be limited, and combined with poor conversational skills, would isolate him.²¹⁹

By any measure, Brendan's language scores and communication

²¹² See 34 C.F.R. § 300.114(a)(2)(i) (2018).

²¹³ In 2005, two of Brendan's classes were in the "Resource Room." Otherwise, he was "mainstreamed" with non-disabled students. Trial Exhibit 218, *supra* note 176.

²¹⁴ See *id.*

²¹⁵ See Trial Exhibit 219, *supra* note 19.

²¹⁶ See Reed, *supra* note 211, at 178.

²¹⁷ See *id.* at 171. Brendan attempted to express something of this in the first interview:

Det. Baldwin: "Yeah I know you're scared, okay and I can appreciate it."
Dassey: "Sometimes I get shy when I don't know anybody."

Trial Exhibit 203, *supra* note 184, at 46.

²¹⁸ See Reed, *supra* note 211, at 188.

²¹⁹ See *id.* at 172, 177.

skills are heartbreakingly poor, and the effects would have been staggering. Perhaps the most trenchant observation about Brendan's situation came from a speech-language professional in Northern Ireland. When shown the SLP's report, the former head of the Royal College of Speech and Language Therapists could only say "Crikey[,] This is appalling!"²²⁰

B. What Does This Mean for Interviewing Brendan?

Given what we know about Brendan's ability to cope verbally, it seems ludicrous to even contemplate letting him be questioned by law enforcement. Yet, Brendan could, in fact, have been effectively interviewed, if—and this is a big if—the person or persons doing the interviewing knew what they were doing. Even with his limited language ability, Brendan had enough of the basics to be able to tell his experiences and answer a skilled interviewer's questions to fill in gaps in his narratives. However, Brendan's language profile combined with his age means that an interviewer would have to adhere to a rigorous protocol that protects against contamination, confusion, and intimidation. Moreover, even with well-intentioned, well-trained interviewers, Brendan could not be left alone.

In any interview that deviated from protocol, however, we expect that Brendan would be defenseless, especially if that interview is in reality a high-pressure interrogation. Just as at school, he would be overwhelmed by too much verbiage. There would be much he would miss, he would constantly struggle to grasp what is being thrown at him, and he would quickly become cognitively overloaded. He could easily misread interrogators' verbal and non-verbal signals.²²¹ As the records show, he would not ask for clarification if he did not understand.²²² Neither would he argue.²²³ Ultimately, in an exhausted act of self-preservation, he would be expected to simply go along.

C. Why Didn't Anybody See This?

A brief perusal of Brendan's school records makes it abundantly clear that his severe language deficiencies are a central part of who

²²⁰ E-mail from Alison McCullough to Michele LaVigne, *supra* note 20.

²²¹ See COLES ET AL., *supra* note 100, at 5.

²²² See Trial Exhibit 218, *supra* note 176; Trial Exhibit 219, *supra* note 19. See also LaVigne & Van Rybroek, *supra* note 17, at 77 (explaining that individuals with language difficulties have an inability to seek clarification).

²²³ See Trial Exhibit 231, *supra* note 93, at 2; *infra* app. 2.

he is and how he operates.²²⁴ How is it then, that the words “language impairment” were never uttered? How is it that Brendan’s communication difficulties by any name barely received any mention at all during the pretrial or trial process?²²⁵

As noted in the evaluation, Brendan’s speech was intelligible (i.e., did not draw attention to itself).²²⁶ And, as the videos show, he could speak in complete, though short, sentences. On several occasions he strung short sentences together.²²⁷ He nodded repeatedly and did not admit to confusion.²²⁸ Without examining these behaviors further—i.e., through the lens of language deficit—some observers might (and did) mistakenly believe he could function competently in an interview situation.

And Brendan, like so many other impaired adolescents, would have developed strategies to hide his disability and avoid negative social evaluations.²²⁹ Depending on the individual, this can take a variety of forms.²³⁰ By all accounts, Brendan’s strategies appear to involve extreme compliance—agreeing to just about everything, trying to do what the person in authority wanted, pretending to understand, and rarely asking for clarification.²³¹

Finally, we must return to the fact that most of the legal profession, just like most of the general public, has never heard of language impairments and does not know what they look or sound like.²³²

²²⁴ See Trial Exhibit 219, *supra* note 19.

²²⁵ Only Brendan’s trial attorney seemed to recognize that Brendan had communication problems. Unfortunately, he did not connect his language deficits with his behavior in the interrogation or with the verbal behavior of Wiegert and Fassbender. This would have required an expert. See Transcript of Trial (Day 6), *supra* note 27, at 75, 77, 79, 103; see also Transcript of Motion Hearing (Day 4), *supra* note 27, at 217, 218, 231, 232 (discussing Brendan’s communication issues four times).

²²⁶ See Trial Exhibit 220, *supra* note 176.

²²⁷ See, e.g., Audio Recording: Interview by Mark Wiegert, Investigator, Calumet Cty. Sheriff’s Dep’t, with Brendan Dassey at Two Rivers Police Dep’t (Feb. 27, 2006), <https://www.youtube.com/watch?v=cpflqsB1Fyg>; Audio Recording: Interview by Mark Wiegert, Investigator, & Tom Fassbender, Special Agent, Calumet Cty. Sheriff’s Dep’t, with Brendan Dassey in Manitowoc, Wis. (Mar. 1, 2006), <https://www.youtube.com/watch?v=N66bJObYjAl> [hereinafter Audio Recording: Mark Wiegert & Tom Fassbender (Mar. 1, 2006)]; Audio Recording: Interview by Mark Wiegert, Investigator, & Tom Fassbender, Special Agent, Calumet Cty. Sheriff’s Dep’t, with Brendan Dassey, Sheboygan Cty. Sheriff’s Dep’t in Sheboygan, Wis. (May 13, 2006), <https://www.youtube.com/watch?v=VTipx6RfTC0>.

²²⁸ See, e.g., Audio Recording: Mark Wiegert & Tom Fassbender (Mar. 1, 2006), *supra* note 227; *infra* app. 2.

²²⁹ AOIFE MURPHY, NAT’L BEHAVIOUR SUPPORT SERV., UNIV. OF LIMERICK, SPEECH, LANGUAGE AND COMMUNICATION NEEDS IN ADOLESCENTS 13 (2011), https://www.nbss.ie/sites/default/files/publications/1_slc_needs_booklet_navy_0.pdf.

²³⁰ See *id.*

²³¹ See *id.*; see, e.g., *infra* app. 2, app.3 (showing instances of Brendan agreeing with officers).

²³² See MURPHY, *supra* note 229, at 13; LaVigne & Van Rybroek, *supra* note 18, at 42–43, 44, 58–59.

Which might be marginally acceptable²³³ if the legal profession did not, as happened throughout this case, fill in the blanks with its own world view. This case record, along with the show itself, is replete with judges and lawyers making assumptions about Brendan's intentions and abilities, and those assumptions were wrong.²³⁴ For example, while it is true that Brendan answered questions, and spoke intelligibly in complete subject-verb-object sentences, those skills are not signs of verbal sophistication.²³⁵ These are language development milestones achieved between the ages of four and six.²³⁶ And no, Brendan did not show "signs of physical distress"²³⁷ while seated on a comfortable couch during the interrogation.²³⁸ He did not yell, swear, stomp out, or refuse to answer questions. He maintained a consistent flat affect and slumped posture throughout. But, if anybody had read through his school records, and perhaps asked a few questions, they would have known that these were hardly signs that he was not intimidated.²³⁹ It is more likely that he was trying to hide.

VII. THE INTERVIEW: ASSESSMENT AND ANALYSIS

When this project began, we thought most of the story would be about Brendan and his language impairment—how his serious limitations would make it difficult for him to express himself in an interview and how his poor comprehension would make it difficult to

²³³ This still does not explain why no one seems to have even talked with the SLP prior to the suppression hearing or trial to find out what these records meant. One of the great mysteries of this case is how these records were totally ignored by pre-trial counsel, though he had them, and not developed by trial counsel. At trial, they were simply admitted into evidence without any explanation. See Transcript of Trial (Day 6), *supra* note 27, at 78–80, 103–04.

²³⁴ Compare *Dassey v. Dittman*, 877 F.3d 297, 305, 310–11, 311–12, (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 2677 (2018) (accepting trial court's characterization of Brendan as having a borderline IQ, attending regular classes, and having a normal speaking tone), *with id.* at 319–320, 330 (Wood, C.J., Rovner, J., Williams, J., dissenting) (calling attention to the incorrect assumptions of the majority, state courts, and counsel on Brendan's limited mental ability).

²³⁵ See *LaVigne & Van Rybroek*, *supra* note 18, at 58–59; Trial Exhibit 220, *supra* note 176 ("Brendan's strengths [include] . . . his articulation skills."); see, e.g., Trial Exhibit 203, *supra* note 184, at 1–3 (providing examples of Brendan responding to basic questions and responding in complete sentences).

²³⁶ JANET R. LANZA & LYNN K. FLAHLIVE, LINGUISTIC SYSTEMS GUIDE TO COMMUNICATION MILESTONES 17 (2008), <https://speechhearing.columbian.gwu.edu/sites/g/files/zaxdzs1996/f/downloads/Milestonesguide.pdf>.

²³⁷ *Dassey*, 877 F.3d at 313.

²³⁸ The trial court and the majority of the en banc Court of Appeals made much of the fact that Brendan was allowed to sit on a comfortable couch rather than a hard chair. See *id.* at 306; *State v. Dassey*, No. 06-CF-88, slip op. at 7–8 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).

²³⁹ See *Dassey*, slip op. at 8–9; Trial Exhibit 220, *supra* note 176.

understand much of what Wiegert and Fassbender said and asked him, and the potential consequences of anything he said.²⁴⁰ What we did not appreciate was the powerful force that would be exerted by Wiegert and Fassbender's own language and language usage.

Although there is no perfect interview, even with rigorous training and review,²⁴¹ the police in this case could hardly be further from best practice, or even acceptable practice.²⁴² Even without the additional language and language impairment layers we are describing here, this interrogation is widely considered a textbook example of "what not to do" in interrogations involving juveniles and individuals with intellectual impairments."²⁴³ When we add in the language piece, this interview becomes an abomination.

A. *Before the Interview*

The stage was set for law enforcement malpractice long before the interview ever began, starting with investigator training. Proficiency as an interviewer is not acquired from several training seminars or even from a weeklong session.²⁴⁴ It is an intense and on-going process. Yet, the chief investigator and interrogator, Mark Wiegert, testified that his training only consisted of the controversial Reid

²⁴⁰ We knew that Brendan's test results showed severe problems understanding single sentences and paragraph-length spoken language. See Trial Exhibit 220, *supra* note 176.

²⁴¹ Stewart et al., *supra* note 135, at 199–200, 211–12.

²⁴² We acknowledge that they did observe some recommended practices—providing Brendan with a comfortable seat, a room without distractions, and maintaining a calm, unemotional tone.

²⁴³ Brief of Independent Law Enforcement Instructors & Consultants as Amici Curiae Supporting Petitioner at 5, *Dassey v. Dittmann*, 138 S. Ct. 2677 (2018) (No. 17-1172).

²⁴⁴ The initial training for the investigative interview system (PEACE) used in the U.K., Canada, and Australia lasts up to eighteen days with extensive review, assessment, and supplemental training. See Mary Schollum, *Bringing PEACE to the United States: A Framework for Investigative Interviewing*, POLICE CHIEF, Nov. 2017, at 30, 32, 33, 34. See also *infra* Conclusion (discussing information about the PEACE system).

technique²⁴⁵ seminar (which lasts one, three, or four days),²⁴⁶ plus several “other one-day seminars.”²⁴⁷ After that, he relied on his “own experience.”²⁴⁸ By any measure, this is hopelessly inadequate, not to mention dangerous. Even more alarming is the fact that Wiegert claimed to have developed his own hybrid technique.²⁴⁹ He proudly testified, “after you’ve done interviews for several years, um, you kind of develop your own style, I think, and you incorporate some things from different trainings that you attend.”²⁵⁰

Wiegert and Fassbender approached this particular interview with a similar lack of rigor and standards. The correct practice for any high-stakes interview begins with preparation, which among other things requires that the interviewers learn about the person to be interviewed.²⁵¹ That did not happen here, nor did Wiegert even believe that preparation was important.²⁵² Wiegert and Fassbender knew almost nothing about Brendan when they questioned him for hours on February 27th and March 1st.²⁵³ Then, at some point, when Wiegert and Fassbender did obtain information, it was wrong.²⁵⁴ At trial, Wiegert testified that it never occurred to him that Brendan might have some cognitive limitations, he did not know he was in

²⁴⁵ The Reid Technique begins with a Behavior Analysis Interview where the interviewer determines if the suspect is lying. If the interviewer believes the suspect is guilty, the interrogation begins. The interrogation consists of the following nine-step approach:

[A]n interrogator confronts the suspect with assertions of guilty (Step 1), then develops “themes” that psychologically justify or excuse the crime (Step 2), interrupts all efforts at denial (Step 3), overcomes the suspect’s factual, moral, and emotional objections (Step 4), ensures that the passive suspect does not withdraw (Step 5), shows sympathy and understanding and urges the suspect to cooperate (Step 6), offers a face-saving alternative construal of the alleged guilty act (Step 7), gets the suspect to recount the details of his or her crime (Step 8), and converts the latter statement into a full written confession (Step 9).

Dassey v. Dittmann, 877 F.3d 297, 321 (7th Cir. 2017) (en banc) (Wood, C.J., Rovner, J., Williams, J., dissenting), *cert. denied*, 138 S. Ct. 2677 (2018).

²⁴⁶ See *Training Programs*, JOHN E. REID & ASSOCS., INC., http://www.reid.com/training_programs/r_training.html (last visited Feb. 8, 2019).

²⁴⁷ See Transcript of Motion Hearing Day 5 at 9, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Jan. 22, 2010) [hereinafter Motion Hearing Day 5].

²⁴⁸ *Id.*

²⁴⁹ See *id.* at 8–9.

²⁵⁰ *Id.*

²⁵¹ See Schollum, *supra* note 244, at 33.

²⁵² See Motion Hearing Day 5, *supra* note 247, at 15–16.

²⁵³ See Transcript of Trial Day 5 at 72, *State v. Dassey*, No. 06-CF-88 (Wis. Cir. Ct., Manitowoc Cty. Apr. 20, 2007) [hereinafter Trial Transcript Day 5].

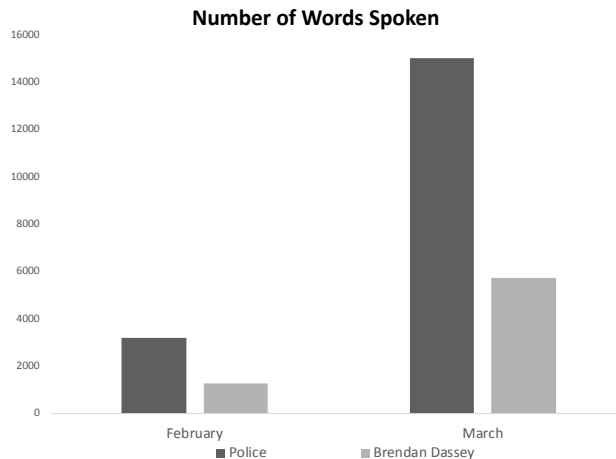
²⁵⁴ See *id.* at 80 (explaining Wiegert’s belief that Brendan was functioning at a cognitive level normal for his age); *but see* Transcript of Trial (Day 6), *supra* note 27 at 77 (explaining how school authorities recognized Brendan’s need for special).

Special Education, and he did not believe that Brendan was impaired in any way: “He was a mainstream student at Mishicot High School. He was in Driver’s Ed. He could answer questions. He could understand.”²⁵⁵

B. Who Did the talking?

Whether in a clinical or forensic setting, the person questioning an adolescent with a language impairment should sit back and let the interviewee do the talking as much as possible.²⁵⁶ In this interview, the questioners did anything but. There was a remarkable disparity in the amount of talking done by the police and Brendan and although Brendan was the informant, the police spoke more than twice as much (2.5+ times).²⁵⁷ The police used a total of 18,325 words in the two interviews we focused on, while Brendan used only 6,998, making his contribution a mere 28% of the total interview.²⁵⁸ These numbers alone (Figure 4) tell us that this interview was utterly inappropriate for Brendan.

Figure 4



²⁵⁵ Transcript of Trial Day 5, *supra* note 253, at 80.

²⁵⁶ See Agnew & Powell, *supra* note 140, at 291.

²⁵⁷ See *infra* fig. 4. Note, all data and examples are taken from the February and March 2006 interviews unless otherwise indicated. See February Interview, *supra* note 21; March Interview, *supra* note 21.

²⁵⁸ See *infra* fig. 4.

C. *The Number of Questions*

One of the simplest counts was number of questions put to Brendan. The total for the two interviews was an astonishing 1,525 (February: 286; March: 1,239 questions).²⁵⁹ They asked questions at a startlingly rapid rate—an average of 6.68 questions per minute, or one question every 9–10 seconds. As we saw over and over again with all our data, these high numbers, shocking as they are, are just the beginning of the story.

D. *Question Types*

The questions were rarely simple, stand-alone affairs. Wiegert and Fassbender sometimes used a series of questions without pausing, or rephrased and recycled questions when Brendan answered “no.”²⁶⁰ They mixed question types, beginning with an open-ended question and, without pausing, posed questions that suggested the content they wanted, and then asking him about the “information” they put into their own questions.²⁶¹ We were, however, ultimately able to sort the questions well enough to classify them by type (Figure 5).

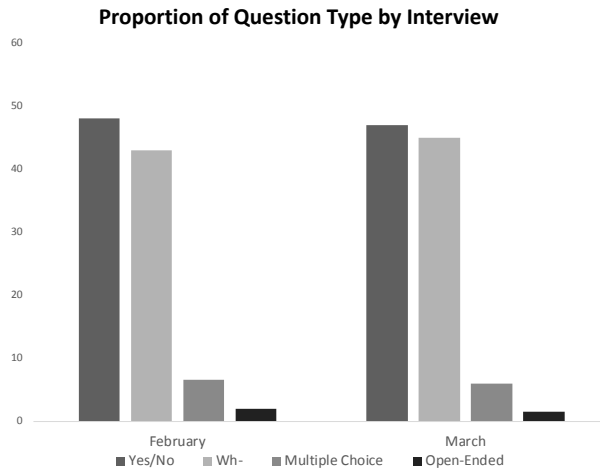
Almost all of Wiegert and Fassbender’s questions, ninety-eight percent, were question types containing high amounts of content—yes/no, wh- and multiple choice—setting up maximal conditions for contamination, confusion, and, for someone like Brendan, intimidation.²⁶² With these high numbers, it is clear that it was the questions themselves, not Brendan’s answers that were the main vehicles for introducing huge amounts of content into the interview.

²⁵⁹ The first interview was about the same length as a school class period, forty-one minutes—it would be hard for Brendan to sustain attention and concentration; the second obviously much longer, three hours and ten minutes. This is a long time for anyone to concentrate, but especially so for Brendan who would fatigue easily when the primary input is in one of his weakest areas: spoken language. Even in children without impairments, there are limits on the ability to sustain attention. Li-Wei Ko et al., *Sustained Attention in Real Classroom Settings: An EEG Study*, FRONTIERS HUM. NEUROSCIENCE, July 31, 2017, at 1, 2 (“[P]eople cannot maintain their optimal attention for a long time without falling into a state of fatigue. . . . [M]ental fatigue is . . . associated with a reduced efficiency of ‘brain work.’”).

²⁶⁰ See, e.g., February Interview, *supra* note 21, at 494–95.

²⁶¹ See, e.g., March Interview, *supra* note 21, at 547.

²⁶² See *infra* fig. 5.

Figure 5

Yes/no questions, which have the highest amount of content and the highest risk of contamination,²⁶³ were the ones used most often, making up nearly half (47%) of Wiegert and Fassbender's questions (674 total).²⁶⁴ A few examples show how the police used these questions, and how much content they introduced without Brendan saying much of anything at all.²⁶⁵

W: You helped to tie her up though, didn't you (pause)
Brendan, because he couldn't tie her up alone,

W: [T]here's no way.

W: Did you help him tie her up?²⁶⁶

In the next example, Wiegert appears, at first, to try to avoid revealing what answer he wanted, but he could not resist providing the answer in the next question:

²⁶³ See Agnew & Powell, *supra* note 140, 274–75.

²⁶⁴ See *supra* fig. 4.

²⁶⁵ For all interview excerpts W = Wiegert, F = Fassbender, and D = Dassey.

²⁶⁶ March Interview, *supra* note 21, at 579.

W: And did he choke her until what,
W: [D]id she go unconscious,
W: [W]hat,
W: [T]ell me.²⁶⁷

Wh- questions were also used extensively—about forty-four percent of the total. While they have a place in a good interview on a limited basis, wh- questions must be carefully crafted and monitored to avoid introducing interviewer content. Again, that did not happen:

W: Now, let's be honest.
W: What did he tell you?
W: What did he show you?
F: What did you see
F: [A]nd what did he tell you?²⁶⁸

Wiegert and Fassbender's wh- questions often presupposed information that Brendan had not given. They were combined with other questions in confusing hodgepodes that suggested how they wanted Brendan to answer, but it was unclear which question to answer or whether to try to answer all of them, as happened here:

F: So, what Mark's sayin' is, did he call you
F: [O]r did he come to the door and say Brendan I need you.
F: What, what did he do?²⁶⁹

A number of times, Wiegert and Fassbender used an uncomplicated, appropriate wh- question, but then they sabotaged their own question by not pausing for an answer.

F: What did you do then?
F: You had to, are you at the door
F: [O]r where are you?
F: When you first hear the screaming where are you?²⁷⁰

²⁶⁷ *Id.* at 579.

²⁶⁸ *Id.* at 550.

²⁶⁹ *Id.* at 553.

²⁷⁰ *Id.* at 568.

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Multiple choice questions, which should never be used, were *six percent* of all questions. The raw number (ninety-nine total) was substantial enough to see a definite pattern in how the police used these questions to plant content.²⁷¹ For example:

W: When was she screaming a lot?

D: [starts to answer] Like

W: While you [were] doing it, after you were doing it, before you did it?²⁷²

Another instance of multiple choice questions being used:

W: So if you had to say, some dimensions like 2 x 2, 2 feet by 2 feet, 10 X 10, how much blood do you think was there?

D: By 2 x 2.²⁷³

Open-ended questions, the minimal content questions recommended by so many experts to be the first used and the most used, were almost non-existent—two percent of the total.²⁷⁴ When the police did use them, it was not in the recommended sequence—to start an interview—or to allow Brendan leeway to introduce his own topics. On one occasion, the police gave themselves the opportunity to begin the interview with a question that actually did elicit a narrative (albeit in a roundabout way), but then they immediately derailed themselves:

W: Should we just go through that whole day again on the 31st

W: [O]r how do you wanna do it?

F: We can that a . . . try to give him a chance to just talk to us and

W: Sure.

F: [I]f he wants to go through the whole day, if he wants to fill in the pieces, that's, that's up to Brendan right now.

W: What would you rather do?

F: Just wanna talk to us and tell us startin' with that day and how you actually came to know what happened and stuff.

²⁷¹ See *infra* fig. 6.

²⁷² See March Interview, *supra* note 21, at 656.

²⁷³ *Id.* at 609.

²⁷⁴ See *infra* fig. 6.

F: Cuz, I already know you were in the garage and stuff apparently cleaning up and stuff

F: [S]o tell us about that. (Brendan nods “yes”)

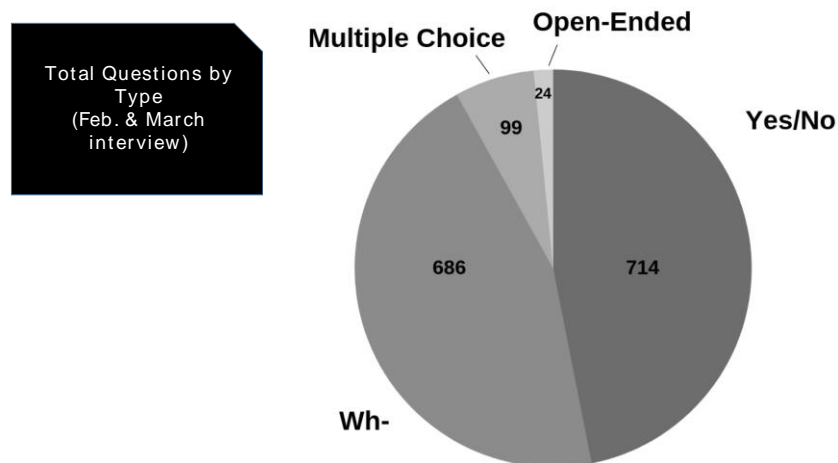
[Brendan starts]

....

W: [Wiegert interrupts] Let’s go back a little bit, OK?”²⁷⁵

The extreme proportion of content-laden questions did not afford much opportunity for Brendan to provide a narrative, and indeed, there is little narrative to be found. The following diagram (Figure 6) gives a sense of the how these percentages and numbers would look in the context of the entire interviews:

Figure 6



Other than a thin sliver of open-ended questions, these interviews are overflowing with content provided by Wiegert and Fassbender’s questions. It is not simply that Wiegert and Fassbender sporadically fed Brendan the specific incriminating details that they chose to cobble together to create the “confession.” These interviews were a steady barrage of contaminating content, against which Brendan and *his* narrative never had a chance.

When we go back to our diagram of best practices, and compare the questioning techniques used with Brendan (Figure 7), we can see how

²⁷⁵ See March Interview, *supra* note 21, at 541–42.

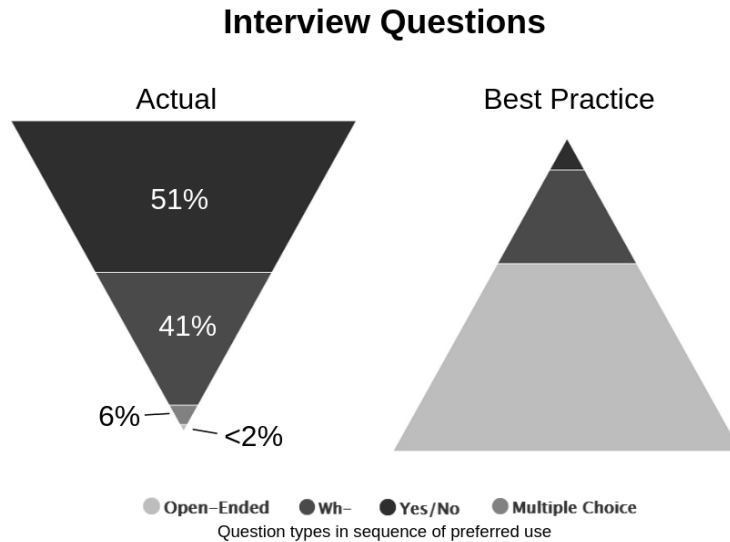
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far these interviews strayed from anything resembling best practice:

Figure 7



E. Multiple Questions

An unusual feature of these interviews is the number of times that Wiegert and Fassbender used multiple questions in a single turn. In order to determine this number, we set the criterion at three or more questions in a turn. By our count, they used three or more questions in a turn a total of thirty-nine times (February: six times; March: thirty-three times).²⁷⁶ If we had used two or more questions as the criterion, the number would have easily exceeded one hundred. We have already included a number of multiple-question turns in our examples above. This additional example shows how a multiple question format was used in combination with other content-feeding questions:

F: And they were just talking,
 F: [W]ere they doing anything else?
 F: Were they screaming, fighting, talking, pushing,

²⁷⁶ See February Interview, *supra* note 21; March Interview, *supra* note 21.

anything?²⁷⁷

Wiegert was asked at trial whether Brendan “would be asked more than one question at a single time before he was allowed to answer.”²⁷⁸ Wiegert responded, “I’m sure there were those occasions.”²⁷⁹ This minimizing response reveals a striking lack of awareness of the dynamics of the interviews, of how many times this actually happened, and of his (Wiegert’s) own personal conduct.

F. Word Salad and Long Paragraphs

The way Wiegert and Fassbender spoke was related to how much they talked, and was equally problematic. Their language was rife with extensive rambling, disorganization, and dysfluent passages. Their utterances were frequently choppy, with stops and starts in the middle of ideas and filled with mixed or ill-fitting metaphors. These kinds of utterances will be inaccessible for someone who lacks the capacity to sort through the verbiage. This excerpt from a longer passage shows what was typical of Wiegert and Fassbender’s language:²⁸⁰

F: [A]nd um and, and, we have had also a chance for two days now to look at what you said and, and listen to the, to tapes a little and stuff like that . . .

D: {Nods}.

F: [A]nd we say, “well you know, Brendan gave us, honestly gave us this information, this information, and that information[,]”

F: [M]aybe I’ll call them dots or whatever

D: {Nods}.

F: [A]nd some of the dots when we look at it, say, “well, I think we need some matching up here, just a little tightening up or something.”

D: {Nods}.

F: We, we feel that, that maybe, I think Mark and I both feel that maybe there’s some, some more that you could tell us, um, that you may have held back for whatever reasons. . . .

²⁷⁷ March Interview, *supra* note 21, at 544.

²⁷⁸ See Trial Transcript Day 5, *supra* note 253, at 72.

²⁷⁹ *Id.*

²⁸⁰ See app.2 (containing full relevant passage and SALT transcription).

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. . . .

F: One of the best ways to, to, to prove to us or more importantly, you know, the courts and stuff is that you tell the whole truth. Don't leave anything out, don't make anything up because you're trying to cover something up a little. Um, and even if those statements are against your own interest, you know what I mean, that, that makes you might, it might make you look a little bad or make you look like you were more involved than you wanna be uh, looked at um, it's hard to do.

D: {Nods}.

F: But it's good from that vantage point to say "hey, there no doubt you're telling the truth because you've now given the whole story." You've even given points where it didn't look real good for you either.

D: {Nods}.

F: And, and I don't know if I if you, your understanding what I'm saying?

D: [M]m huh.²⁸¹

Wiegert and Fassbender were also fond of speaking in paragraphs.²⁸² In the March 1st interview, Wiegert and Fassbender had 157 paragraph length turns, and nineteen instances where they followed their paragraphs with questions for Brendan to answer.²⁸³ Not surprisingly these paragraphs were not the model of fluency.

In the following passage of over 200 words, we can see the problems the police language presented when Wiegert or Fassbender got on a roll. This passage, in particular, showcases what comprehension problems would arise. Brendan would not just have a *hard time* understanding this, he would not be able to follow or process it *at all*.²⁸⁴

F: We're not gonna go any further in this cuz we need to get the truth out now. We know the fire was going. We know that

²⁸¹ *Id.*

²⁸² In calculating these numbers, we set the standard for "paragraph." We conservatively set the criterion for spoken 'paragraphs' at four or more utterances or sentences in a sequence by a single speaker. Again, had we used a lower number of utterances, the number of spoken paragraphs would have risen dramatically. In assessing speaker turn we used treated Wiegert and Fassbender as a single speaker based on their "tag-team" approach.

²⁸³ See March Interview, *supra* note 21.

²⁸⁴ One of Brendan's IEP goals was to establish comprehension of sentences that were ten to twelve words long. We also know that his understanding of paragraph length material was exceptionally poor. Trial Exhibit 218, *supra* note 176.

he had already had his altercation with Teresa. We don't believe there's a Monte in there. I talked to ya the other night and you said nothing about Monte you said nothing about something getting punctured and leaking out. We talked about cleaning somethin' up in that garage. You told me that you thought thinking back now there was blood. It was red in color plus you're at your house. You said six, six-thirty, I'll go that far with ya it might even been earlier. What's goin' on? Let's take it through honestly now.

D: {Nods}

W: Come on Brendan. Be honest. I told you before that's the only thing that's gonna help ya here. We already know what happened. OK. (Brendan nods "yes")

F: We don't get honesty here, I'm your friend right now, but I but I gotta I gotta believe in you and if I don't believe in you, I can't go to bat for you. OK. You're noddin', tell us what happened.

D: {Nods}

W: Your mom said you'd be honest with us.

D: {Nods}

F: And she's behind you a hundred percent no matter what happens here.

W: Yep, that's what she said, cuz she thinks you know more too.

F: We're in your corner.

D: {Nods}

W: We already know what happened now tell us exactly. Don't lie.

F: We can't say it for you Brendan, OK.²⁸⁵

Brendan would not be able to sort through what he did or did not say previously, *and* hold it in his mind, *and* attend to, process, and recall all the other subjects the police introduced here—being honest, what the police know, what Brendan knows, being a friend, what his mom said, and so on.

Even when Wiegert or Fassbender were reading from a script, they delivered the message in such a way that comprehension would have been difficult or impossible. The February 27th interview began with Wiegert's clipped, rapid, dysfluent reading of the *Miranda* rights

²⁸⁵ See March Interview, *supra* note 21, at 547.

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from a form.²⁸⁶ The ellipses indicate brief random pauses:

[B]efore I ask any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to, you have the right to talk . . . to a lawyer for advice . . . before we ask you any questions and have him . . . with you during questioning. You have this right . . . to the advice and presence of a lawyer even though you cannot afford to hire one. We have no way of giving . . . you a lawyer but one will be appointed for you if you wish and if . . . and when you go to court. If you wish to answer questions now without a lawyer present, you have . . . the right to stop answering questions any time. You also have the right to stop answering questions at any time until you talk to a lawyer. I have read the above statement of my rights I understand what my rights are, I am willing to answer questions and to make statements. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made . . . to me and no pressure of any kind has been used against me. Do you agree with that?²⁸⁷

What would it be like to be on the receiving end of that, especially as an impaired adolescent like Brendan, with no prior police experience? At a verbal level, the warning is utterly inaccessible for someone like Brendan. This is a paragraph-length chunk of language, which we already know Brendan cannot follow. Before a question is finally asked, there are 263 words and fifteen sentences, many of which are syntactically complex.²⁸⁸ Two thirds of the way through, Wiegert switches pronouns going from “you” to “I,” again without pausing.²⁸⁹ The ultimate question “[d]o you agree with that?” is essentially part of a long litany without any clue about what “*that*” refers to.²⁹⁰ The obvious response to the question should be “agree with what?” Unfortunately, Brendan just said, “[y]eah.”²⁹¹

²⁸⁶ See Audio Recordings, *supra* note 35.

²⁸⁷ App. 3.

²⁸⁸ See February Interview, *supra* note 21, at 484.

²⁸⁹ See *id.*

²⁹⁰ See *id.*

²⁹¹ *Id.* While it is tempting to delve into the adequacy of the rights that were read and Brendan’s so-called “waiver,” we are not doing so, despite the fact that the trial court made a gratuitous finding that even if he was in custody “the appropriate *Miranda* warnings were given, were understood by this defendant, and, thus, . . . had they been custodial interviews, . . .

G. What About Brendan?

Because this is a voluntariness case, it is not enough to simply criticize law enforcement. We must consider Wiegert's and Fassbender's conduct in the context of the person they interviewed.²⁹² In that context, their behavior was nothing short of cruel. They preyed on Brendan's primary cognitive weakness: communication. Confronted with a kid who has severely impaired abilities to process, comprehend, and manage language, their words became a weapon. Admittedly, Wiegert and Fassbender did not raise their voices—they did not have to. Instead they talked, and talked, and talked, and with the least clarity possible. They asked over fifteen hundred rapid fire questions that were loaded with content, often with no opportunity for response.²⁹³ Wiegert and Fassbender repeatedly interrupted Brendan, distracted him, and, as noted by Chief Judge Wood, “refused to leave him alone.”²⁹⁴ This interview would have been a challenge for anybody. What this interview would have done to Brendan is beyond imagining.

VIII. JUDICIAL IGNORANCE

There were hundreds of pages of court decisions written in Brendan's case. In the end though, the only two that mattered were the trial court's initial denial of the motion to suppress, and the en banc decision by the Seventh Circuit Court of Appeals. Both of these decisions track each other in the analysis of voluntariness, with the Court of Appeals majority fleshing out the trial court's findings to uphold their reasonableness under the Antiterrorism and Effective Death Penalty Act (AEDPA).²⁹⁵ If we had to summarize the essence

the result . . . that the statements were voluntary would remain unchanged.” *State v. Dassey*, No. 06-CF-88, slip op. at 12 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).

²⁹² When determining voluntariness, courts are to use a totality of the circumstances test. *See J.D.B. v. North Carolina*, 564 U.S. 261, 270–71 (2011) (quoting *Stanbury v. California*, 511 U.S. 318, 322 (1994)). “Relevant factors [for consideration] have included such things as where the questioning occurred, how long it lasted, what was said, any physical restraints placed on the suspect's movement,” and certain personal characteristics of the accused. *J.D.B.*, 564 U.S. at 286 (Alito, J. dissenting); *see id.* at 271–72 (finding that a child's age is a relevant characteristic to take into consideration because it effects their perception of whether they are able to freely leave); *see also* *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (describing additional factors including age, lack of education, or intelligence level).

²⁹³ *See* February Interview, *supra* note 21; March Interview, *supra* note 21.

²⁹⁴ *See* *Dassey v. Dittmann*, 877 F.3d 297, 322 (7th Cir. 2017) (Wood, C.J., dissenting).

²⁹⁵ *See id.* at 312. Because the state court of appeals per curiam decision was so brief and conclusory on the issue of voluntariness, the Seventh Circuit focused on the underlying trial court findings. Pursuant to AEDPA, a federal court shall not reverse the judgment of a State

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of the decisions it would be that Brendan looked like he understood and therefore he did, and the police behavior looked polite and was therefore not coercive.

The question of voluntariness—“whether a defendant’s will was overborne in a particular case”—is determined by the totality of the circumstances.²⁹⁶ A court must consider the details of an interrogation as applied to “the unique characteristics of a particular suspect.”²⁹⁷ While the courts certainly cited the test in their decisions, the decisions actually applied this test to facts in only the most literal sense—strictly on the surface. There was no recognition that there might be anything meaningful about Brendan or the interrogations beneath the appearances. Or to put it in common parlance, they didn’t know what they didn’t know.

A. *Brendan*

Given the notoriety of this case, first locally, and later nationally,²⁹⁸ the courts seemed to know surprisingly little about Brendan. They had the basics such as his age and lack of experience with the criminal justice system.²⁹⁹ They knew he had a full-scale IQ of approximately 80 (borderline to low average), but did not place this in any context.³⁰⁰ They did not even mention his significantly lower verbal IQ, which was 65.³⁰¹

While verbal IQ is a limited measure, it more accurately reflected where Brendan had profound difficulty than his full-scale IQ.³⁰² There is nothing in either decision that shows the judges were aware that Brendan’s deficits were almost entirely verbal, that they were

court unless the adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
- or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (2012).

²⁹⁶ See *Schneekloth*, 412 U.S. at 226.

²⁹⁷ See *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)).

²⁹⁸ See *Making a Murderer: Court Upholds Brendan Dassey Conviction*, BBC NEWS (Dec. 9, 2017), <https://www.bbc.com/news/world-us-canada-42291231> (“[The] case received wide attention after the release of the 10-part documentary *Making a Murderer* in December 2015.”).

²⁹⁹ See *Dassey*, 877 F.3d at 315.

³⁰⁰ See *id.* at 310.

³⁰¹ See Transcript of Motion Hearing, *supra* note 28, at 85–91.

³⁰² See *id.* at 86.

severe, and that they impacted his entire life, and not just at school.³⁰³ There was certainly no indication that these deficits would make Brendan more vulnerable in an interrogation.

The decisions displayed a peculiar misconception about Brendan's special education needs. The trial court and the Court of Appeals specifically noted that although Brendan was enrolled in some special education, he spent a majority of his time in "regular classes."³⁰⁴ The Court of Appeals called it "in regular-track classes but [with] some special education help."³⁰⁵ The implication of those comments is that Brendan really is not all that disabled—that he is in "special ed lite"—which is of course not true.³⁰⁶ Brendan was in a regular classroom for part of the day because the law requires it.³⁰⁷ Moreover, as the 2005 IEP reflects, his progress in those regular classrooms was abysmal, so much so that the school moved two of his classes to the "resource room,"³⁰⁸ and the factors that were implicated in his lack of progress were exactly what we would expect—that litany of poor communication skills from processing to memory to reading.³⁰⁹

The Courts' observations about Brendan's flat, low-key demeanor during the interrogations played a significant role in the finding of voluntariness and were equally superficial and off the mark. The trial court said, "[n]othing on the videotape visually depicts Brendan Dassey as being agitated, upset, frightened, or intimidated by the questions of either investigator. His demeanor was steady throughout the actual questioning."³¹⁰ This finding suggests that upset, frightened, or intimidated has only one look and that judges know what that is. But a speech-language professional will tell you what the courts saw as "steady throughout" was more likely an attempt to withdraw from a situation that was overwhelming.³¹¹

³⁰³ See *id.* at 89–91; Trial Exhibit 219, *supra* note 19; Trial Exhibit 220, *supra* note 176. 81:10-91:7; see *supra* note 176.

³⁰⁴ See *State v. Dassey*, No. 06-CF-88, slip op. at 3 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).

³⁰⁵ See *Dassey*, 877 F.3d at 310.

³⁰⁶ See Trial Exhibit 218, *supra* note 176; Trial Exhibit 219, *supra* note 19.

³⁰⁷ See *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 789 (6th Cir. 2018). IDEA requires the least restrictive alternative which, in the absence of serious behavioral or social problems, means that a child with disabilities, even severe disabilities, can be mainstreamed in a regular classroom with non-disabled peers whenever possible. *Id.*

³⁰⁸ See Trial Exhibit 218, *supra* note 176; Trial Exhibit 219, *supra* note 19.

³⁰⁹ See Trial Exhibit 218, *supra* note 176; Trial Exhibit 219, *supra* note 19.

³¹⁰ See *State v. Dassey*, No. 06-CF-88, slip op. at 8–9 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).

³¹¹ See *id.* at 9; Alicia Lynch, *How Speech, Language, and Communication Difficulties "Made a Murderer"*, MABLE THERAPY, <https://mabletherapy.com/2018/11/06/slcn-makingamurderer->

The courts also took note of the fact that Brendan did not, in any way, refuse to cooperate; i.e., “at ‘no time did he ask to stop the interview or request that his mother or a lawyer be present.’”³¹² As his school records clearly show, however, going along is what Brendan does. In classes, he was described as “a very quiet student. He is respectful to teachers. He does not offer answers in class unless he is called on and then he usually won’t talk,” yet, he will occasionally ask questions when he is unsure, however eye contact and participation during [d]iscussions with adults and peers is limited.”³¹³ That such an individual would, or could, in some way stand up to the police by asking for a lawyer or his mother is pure folly.³¹⁴ The Court further relied on the fact that Brendan “nodded” as a sign of acquiescence,³¹⁵ but the video shows Brendan nodding to anything, even when Wiegert or Fassbender were talking gibberish.

The court was equally misguided when it concluded that Brendan “resisted repeated suggestions”³¹⁶ from Wiegert and Fassbender -- the implication being that this “resistance” demonstrates that the confession was voluntary. The court did not provide any working definition of resist, so we cannot be entirely sure of the standard. However, it looks like the court (along with the state, whose arguments on this point the court apparently adopted) engaged in a wholly subjective I-know-it-when-I-see-it determination³¹⁷ that relied on carefully selected and edited fragments with Brendan saying “I don’t know”³¹⁸ or remaining consistent when the police “followed up” with “are you sure?”³¹⁹

brendan/ (last visited Feb. 27, 2019).

³¹² See *Dassey v. Dittmann*, 877 F.3d 297, 311 (7th Cir. 2017); *Dassey*, slip op. at 9.

³¹³ Trial Exhibit 218, *supra* note 176.

³¹⁴ *Cf. Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (arguing that any younger adolescent would assert themselves that way against the police is highly unlikely).

³¹⁵ See *Dassey*, 877 F.3d at 307.

³¹⁶ *Id.* at 309; see Brief and Short Appendix of Respondent-Appellant, Michael A. Dittmann at 37–38, 44, *Dassey v. Dittmann*, 877 F.3d 297 (7th Cir. 2017) (No. 16-3397), http://www.stev.enaverycase.org/wp-content/uploads/2016/10/States-Appeal-and-Short-Appendix_10-19-16.pdf.

³¹⁷ The majority of the court, seems to have gone with an intuitive approach toward the question of resistance. Unfortunately, “intuitive judgments are often flawed . . . Intuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so.” Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007).

³¹⁸ *Dassey*, 877 F.3d at 309. Arguably, the state was intentionally selective and misleading in its portrayal of this and other aspects of the interrogation. *Dassey*, 877 F.3d at 320 (Wood, C.J., dissenting).

³¹⁹ Brief and Short Appendix of Respondent-Appellant, Michael A. Dittmann, *supra* note 316, at 16–17. We have placed quotation marks around “follow up” because “are you sure?” in

An honest and accurate assessment of whether Brendan's verbal conduct demonstrated an ability to resist police suggestion and pressure requires an analysis of the entire interview, not simply cherry-picking discrete decontextualized examples.³²⁰ Because this was an important factor in the final outcome, we did just that; we thoroughly reviewed the complete March 1st interview, including verbal and non-verbal conduct, to look for evidence of resistance. We found none.

Overall, Brendan could be described as extremely compliant. He acquiesced by answering questions when he was given the chance, either with brief pieces of content—many of which originated with Wiegert and Fassbender—or with a confirmatory “yes” (247 “yes” responses).³²¹ He also nodded a lot—236 times³²²—even when police verbiage would have been impossible for him to understand.

Was Brendan ever not in perfect lock-step with Wiegert and Fassbender? Yes, though rarely, and even those so-called deviations could not be considered resisting. He did use the word “no” in his responses 136 times; however, many of these were actually confirmatory “nos.”³²³ He replied “I don't know” or “I can't remember” forty-one times to the policemen's 1239 questions.³²⁴ He requested clarification all of four times.³²⁵ Meanwhile, the transcript shows that Brendan changed aspects of the story in response to police questioning *fifty-eight times*.³²⁶ We found that when Wiegert and Fassbender repeated questions, asked if he was sure, and/or admonished him to tell the truth, Brendan stayed with an answer he gave forty-four times,³²⁷ but even this must be looked at in context. *Eleven* of these instances involved staying with an answer that he had *already* changed, or changing it after repeated questioning, even though he initially seemed to stay with it.³²⁸ In other words, when

no way qualifies as a follow up question in the realm of professional interviewing. See Hershkowitz, *supra* note 148, at app.

³²⁰ This is both a professional and a legal standard. See *Dassey*, 877 F.3d at 322 (Wood, C.J., dissenting) (“These cases cannot be assessed based on one sentence.”).

³²¹ See March Interview, *supra* note 21.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ One of the more glaring examples came when Wiegert and Fassbender were asking how many times Ms. Halbach was shot:

W: How many times?

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we look at the March 1st interview as a whole, Brendan cannot be said to have resisted anything.³²⁹

One specific aspect of both opinions that truly beggars belief is the finding that Brendan understood the Miranda warnings that were read to him twice.³³⁰ Though Miranda itself was not an issue, the courts took the warnings and Brendan's supposed "understanding" and "knowing, voluntary, intelligent waiver" into account in the voluntariness calculus.³³¹ It is hard not to look at Brendan's school and IEP records and say "Really? Really, you think he understood that?" While it is true that Brendan did say he understood and remembered his rights, we do not have to look too far to know that is utterly impossible, especially the way they were read by Wiegert. Understanding Miranda takes a full complement of verbal skills, from processing to verbal memory,³³² and Brendan desperately lacked in every one of them.

B. Law Enforcement Behavior and the Interrogation

The decisions repeatedly remind us that Wiegert and Fassbender were courteous, perhaps even unctuous.³³³ "The[y] . . . stayed calm and never even raised their voices."³³⁴ "The entire interview,

[2 second pause].

D: Twice.

W: OK.

F: On her body too or where else?

[5 second pause].

F: How many times did he shoot her Brendan?

D: Twice.

Id. At first glance, it appears that Brendan stuck with his answer of "twice" in the face of repeated questions. But later in the interview, he changed the answer to ten times. March Interview, *supra* note 21. Later on still, in response to further questioning, he again changed the answer to "ten" at which point Wiegert says "[t]hat makes sense. Now we believe you." *Id.* at 72. We will never know how high Brendan would have gone had Wiegert and Fassbender not accepted "ten."

³²⁹ *The Oxford Pocket American Dictionary of Current English* defines "resist" as to "withstand the action or effect of, repel; try to impede, refuse to comply with; offer opposition. THE OXFORD POCKET AMERICAN DICTIONARY OF CURRENT ENGLISH 682 (2002).

³³⁰ See *Dassey*, 877 F.3d at 312.

³³¹ See *Dickerson v. United States*, 530 U.S. 428, 433–34, 449 (2000) (Scalia, J., dissenting); *Dassey*, 877 F.3d at 312; *State v. Dassey*, No. 06-CF-88, slip op. at 11 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).

³³² See *LaVigne & Van Rybroek*, *supra* note 18, at 74.

³³³ Judge Ann Williams commented during the en banc oral argument that Wiegert and Fassbender made her "skin crawl." Oral Argument at 28:17–29:10, *Dassey v. Dittmann*, 877 F.3d 297 (7th Cir. 2017) (No. 16-3397), http://media.ca7.uscourts.gov/sound/2017/rs.16-3397.16-3397_09_26_2017.mp3.

³³⁴ *Dassey*, 877 F.3d at 313.

including the admonitions, was done by both investigators in a normal speaking tone with no raised voices, no hectoring, or threats of any kind.”³³⁵ Such comments suggest that courteous somehow precludes coercion. But what else could those interviews be called but hectoring? It does not matter whether they used a conversational tone—Wiegert and Fassbender were relentless in their verbal assault on a child with limited verbal functioning.

According to the Court of Appeals, the most that Wiegert and Fassbender did was “press[] . . . with further questions.”³³⁶ To be sure, simply asking questions will rarely rise to the level of coercion.³³⁷ But the voluntariness standard requires that courts look at the compounding tactics of the police in the context of the individual.³³⁸ In the case of Brendan’s interrogation, the interviewers put 1,525 questions to a juvenile with language processing deficits.³³⁹ They had more questions than all of Brendan’s utterances put together. In the post-conviction hearing, Dr. Richard Leo, an expert on the psychology of false confessions, testified that a tactic that is ordinarily not coercive in small doses might become coercive “if repeated over and over.”³⁴⁰ With this juvenile, pressing with further questions over 1,500 times will easily become coercive, and then some.³⁴¹

The Court of Appeals placed stock in the fact that Brendan allegedly provided incriminating information in response to “open-ended” questions; however, the decision is silent about what those open-ended questions might be.³⁴² It seems likely that the court relied on an assertion in the state’s brief that “the investigators used primarily broad, open-ended questions and let Dassey tell his story.”³⁴³ The state’s brief went on to give examples. “What did he tell you he did to her?” “[W]hat else did he do to her?” “[W]hat do you do when she’s on the fire?” “You just heard screaming over

³³⁵ *Dassey*, slip op. at 8.

³³⁶ *See Dassey*, 877 F.3d at 313.

³³⁷ *See id.* at 304.

³³⁸ *See Gallegos v. Colorado*, 370 U.S. 49, 52–53 (1962).

³³⁹ *See supra* note 259 and accompanying text; *Dassey*, 877 F.3d at 312.

³⁴⁰ *See State v. Dassey*, No. 06-CF-88, slip op. at 14 (Wis. Cir. Ct., Manitowoc Cty. Dec. 13, 2010), <http://www.stevenaverycase.org/wp-content/uploads/2017/02/2010-12-13-Post-Conviction-Memorandum-Decision-and-Order.pdf>.

³⁴¹ *See, e.g., Miller v. Fenton*, 474 U.S. 104, 109 (1985). In another revealing display of lack of awareness, Wiegert testified that he does not use the technique of “pepper[ing] an individual with questions” during an interview. *See* Transcript of Trial Day 5, *supra* note 253, at 90:9–13.

³⁴² *See Dassey*, 877 F.3d at 301.

³⁴³ Brief and Short Appendix of Respondent-Appellant, Michael A. Dittmann at 13, *Dassey*, 877 F.3d 297 (No. 16-3397).

there You went inside, didn't you?"³⁴⁴ The only problem is that those are not open-ended questions. Maybe these questions would not draw an objection during direct examination, but that does not mean they are open-ended for interviewing purposes. The examples plant content and direct the narrative as surely as if Wiegert and Fassbender were cross-examining Brendan. As we said previously, these so-called open questions do not exist in isolation; they were embedded in a raging torrent of questions of all types, many of which allowed no opportunity for any answer, let alone a narrative.³⁴⁵

The court additionally found that the interviews/interrogation lasted "a relatively brief time."³⁴⁶ But like all aspects of an interrogation, time must be considered "as applied to *this* suspect."³⁴⁷ A relatively brief time is just that—relative. While three hours may not be a long time for an adult professional, we must look at it through the eyes of a sixteen-year-old with severe verbal deficits and a psychological profile to match.³⁴⁸ For that child, three hours would have been an eternity.

Finally, we have the couch. It is true that during the interview, Brendan was allowed to sit on a comfortable couch rather than at a Formica table with a metal chair.³⁴⁹ The courts made much of this couch and the "soft' interview room."³⁵⁰ And, indeed, this is the one area where Wiegert and Fassbender followed best practices.³⁵¹ Nevertheless, a couch, a bathroom break, a soft drink, and a bag of chips cannot undo the vicious nature of what was done to him.³⁵²

IX. CONCLUSION: COMING INTO THE 21ST CENTURY

Brendan Dassey is not unique. Among the multitudes who come through the criminal and juvenile justice system, he is not even all

³⁴⁴ *Id.* at 13–14.

³⁴⁵ *See Dassey*, 877 F.3d at 320 (Wood, C.J., dissenting). Chief Judge Wood chastised the State for its "tidy and selective summary" of the interrogations. *Id.*

³⁴⁶ *Id.* at 301 (majority opinion).

³⁴⁷ *See Miller*, 474 U.S. at 116.

³⁴⁸ *See* Trial Exhibit 231, *supra* note 93, at 2, 5.

³⁴⁹ *See Dassey*, 877 F.3d at 306.

³⁵⁰ *See id.*; *id.* at 322 (Wood, C.J., dissenting); *State v. Dassey*, No. 06-CF-88, slip op. 7–8 (Wis. Cir. Ct., Manitowoc Cty. May 12, 2006).

³⁵¹ *Cf. Dassey*, 877 F.3d at 317–18 (majority opinion) (analyzing the best police interview methodology). It is possible that Wiegert and Fassbender also tried to establish rapport at the beginning of the interviews. However, establishing rapport requires that the interviewer let the subject talk. Hershkowitz et al., *supra* note 148, at 434. This was not done.

³⁵² *See Dassey*, 877 F.3d at 306; *see also id.* at 337 (Wood, C.J., dissenting) ("His confession was not voluntary and his conviction should not stand, and yet an impaired teenager has been sentenced to life in prison.").

that unusual. He has severe language deficits, and so do many others found on court dockets and in prisons.³⁵³ What sets Brendan apart is the national attention brought about by a Netflix series.³⁵⁴ This exposure has afforded us the opportunity to sound the alarm about the common disorder most people have never heard of while talking about a case known by millions.

The final decision in Brendan's case reflects much that is wrong with criminal justice in the United States. The power of AEDPA, a statutory horror that exalts form and finality over substance and justice, cannot be overstated. The Reid technique—which has been implicated again and again in false confessions, but has no scientific basis whatsoever,³⁵⁵ and is based on hunch and folk wisdom³⁵⁶—is still a widely accepted means of extracting a confession. And, if the majority opinion is to be believed, the American legal system has no interest in best practice.

In her dissent to the en banc decision, Judge Rovner wrote that “most courts’ evaluations of coercion are still based largely on outdated ideas about human psychology and rational decision-making. It is time to bring our understanding of coercion into the twenty-first century.”³⁵⁷ We would like to add language, language impairments, and communication into that mix. Moving beyond “a fifty-year-old understanding of human behavior”³⁵⁸ and human communication should not be impossible, or even all that difficult. It has happened in other countries, taking the form of new models that incorporate contemporary knowledge and best practices.

³⁵³ See Trial Exhibit 231, *supra* note 93, at 2; LaVigne & Rybroek, *supra* note 18, at 42–43, 44.

³⁵⁴ See Shane Nyman, *Just How Popular Is ‘Making a Murderer’?*, POST CRESCENT (Jan. 14, 2016), <https://www.postcrescent.com/story/news/local/2016/01/12/just-how-popular-making-murderer/78507664/>.

³⁵⁵ See Buffie Brooke Merryman, *Arguments Against Use of the Reid Technique for Juvenile Interrogations*, 10 COMM. L. REV. 16, 24–25 (2010); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 986–87 (1997) (“If an interrogation is poorly founded—based on guesses, hunches, or pseudoscientific behavioral cues—[an interrogator] necessarily lacks a valid foundation from which to accuse and confront the suspect.”); see also Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 MIL. L. REV. 1, 31–32 (2007) (explaining the affect of being trained in Behavior Symptom Analysis); Saul M. Kassin, *Effective Screening for Truth Telling: Is it Possible? Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 812 (2002) (describing the training outcomes of the “Reid Technique”).

³⁵⁶ See Kageleiry, *supra* note 355, at 31–32. When dozens of studies conducted by social psychologists are combined, a general rule emerges—that “people are poor human lie detectors.” See Kassin, *supra* note 355, at 809.

³⁵⁷ *Dassey*, 877 F.3d at 331 (Rovner, J., dissenting).

³⁵⁸ *Id.* at 333.

In the United Kingdom for example, the widely-used PEACE framework for investigative interviewing of all witnesses and suspects was developed after a series of high-profile wrongful convictions and exonerations.³⁵⁹ PEACE is an acronym for a robustly researched model of forensic interviewing that is “non[-]coercive, ethically sound, and evidence based.”³⁶⁰ The PEACE model relies on the extensive training, assessment and review of every police officer, as well as specific supervisor training to provide this feedback to officers.³⁶¹ Additionally, the PEACE model incorporates pre-interview preparation to help anticipate special needs or issues, with a clear preference for open-ended questions.³⁶² Much has been written about PEACE and why it is superior to the interrogation methods that continue to be used in the United States.³⁶³

The United Kingdom has also utilizes a “Registered Intermediary Scheme,” a bold program specifically designed to protect the special needs of witnesses and suspects with language deficits.³⁶⁴ This is part of a national campaign to increase public awareness about language impairments, especially in the criminal justice system.³⁶⁵ Recognizing that linguistically-impaired individuals are vulnerable and face gargantuan hurdles when dealing with police, lawyers, and judges, the Intermediary Scheme provides for a professional communication specialist such as a speech-language pathologist to assist with communication during witness interviews and testimony in cases where an assessment shows the individual to be vulnerable

³⁵⁹ See Schollum, *supra* note 244, at 30, 32. The PEACE system is also used in parts of Canada and Australia. *Id.* at 33.

³⁶⁰ *Id.* at 32.

The letters of PEACE stand for

- Planning and Preparation
- Engage and Explain
- Account (Clarification and Challenge)
- Closure
- Evaluation

Id.

³⁶¹ *Id.* at 34. The PEACE system requires up to eighteen days of initial training, combined with on-going review, feedback, and updated training. *Id.* This is based on the recognition that “few investigators have an innate ability to carry out investigative interviews with the necessary levels of skill and sensitivity expected by the public and the criminal justice system—it takes training and practice to develop this ability.” *Id.* at 30.

³⁶² See *id.* at 33; see generally Oxburgh, et al., *supra* note 167, at 48, 61 (explaining the importance of open-ended questions).

³⁶³ See Schollum, *supra* note 244, at 33, 34.

³⁶⁴ See COLES ET AL., *supra* note 100, at 20; *Northern Ireland Registered Intermediary Scheme*, DEPT. JUST., <https://www.justice-ni.gov.uk/ri> (last visited Feb. 28, 2019).

³⁶⁵ See COLES ET AL., *supra* note 100, at 17–18.

due to deficits in communication.³⁶⁶ In Northern Ireland the program has been extended to include vulnerable accused,³⁶⁷ like Brendan. England and Wales are considering intermediaries for accused individuals as well.³⁶⁸

Whether either of these systems is adaptable to the United States, the point is that new ways of thinking about communication and psychology on a large scale are indeed possible. The American legal system need not be inextricably bound to the kind of hackneyed, surface level assessments that the criminal justice system routinely dispenses and that we saw here. Until that day however, we can expect countless more “extreme malfunctions,”³⁶⁹ like this one. The only difference is that they will not be on TV.

Before we ever started this project, we were fairly certain that what happened to Brendan Dassey in the police department interview room, and later in the courtroom, was an indictment against the entire criminal justice system. Taking a closer look, under the hood,³⁷⁰ removed all doubt. This is truly a profound miscarriage of justice.

³⁶⁶ See Penny Cooper & Michelle Mattison, *Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model*, 2 INT’L J. EVIDENCE & PROOF 351, 352 (2017); *Northern Ireland Registered Intermediary Scheme*, *supra* note 364.

The assessment framework may include exploration of the person’s:

1. receptive communication (ability to understand language and question forms);
2. expressive language (ability to use language to inform, describe and clarify);
3. ability to refute inaccurate suggestions;
4. ability to shift perspective (comprehension of other people’s thoughts and beliefs and feelings);
5. ability to concentrate and attend to tasks, and to manage his/her own arousal and anxiety;
6. [and] use of external aids to support communication, such as drawing and ‘cue cards’

Cooper & Mattison, *supra* note 366, at 358. Brendan would clearly meet the criteria.

³⁶⁷ The Criminal Evidence Order 1999, SI 1999/2789, art. 4 (N. Ir.)

Article 21BA of the Criminal Evidence (N. Ir.) Order 1999.

³⁶⁸ Cooper & Mattison, *supra* note 366, at 360–61.

³⁶⁹ See *Dassey v. Dittmann*, 877 F.3d 297, 319 (7th Cir. 2017) (Wood, C.J., dissenting). The malfunctions are not limited to involuntary statements. Unrecognized language deficits can cause breakdowns in the attorney client relationship, the ability to participate, and decision-making. See LaVigne & Van Rybroek, *supra* note 17, 78, 87–88, 94; see also LaVigne & Van Rybroek, *supra* note 18, at 44–45, 66, 70 (explaining the importance of communication with an attorney for people with language disorders).

³⁷⁰ Throughout this article, we have used the metaphor of looking under the hood. It is not lost on the co-authors that damning evidence against Steven Avery was found under the hood of Teresa Halbach’s car. We believe that proves our point about the importance of looking beneath the surface.

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APPENDIX 1: INTERVIEW CHARACTERISTICS DATA TABLE

	Date of Interview	11/5/05 Marinette		2/27/06 Wiegert/Fassbinder		3/1/06 Wiegert/Fassbinder	
Time		1 hour, 18 min 78 minutes		41 min		3 hours, 10 min 190 minutes	
Amount of talk per speaker		PO	BD	W&F	BD	W&F	BD
Total number of words		6234	2308	3215	1257	15020	5741
% of words spoken by each speaker		2.7x more than BD	27% of interview	2.5x more than BD	28% of interview	2.6x more than BD	27.6% of interview
Police	? Type	Total # each type	% of total ?	Total # each type	% of total ?	Total # each type	% of total ?
Questions: high content	Yes/No	344	64%	137	48.0%	577	47.0%
	Wh-	165	30%	124	43.0%	562	45.0%
	Multiple Choice	25	5%	19	6.6%	80	6.0%
Questions: minimal content	Open-ended	6	1%	6	2.0%	18	1.5%
	Total # ?	540		286		1239	
Number of ?? per minute		6.8		6.97		6.5	
		----- 1 Question every 9-10 seconds, on average -----					
Brendan		11/5/05		2/27/06		3/1/06	

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Words per turn (range)		1-21 words		
Length		Half of BD's utterances were 0 (nods) or 1, 2, 3 words long		
Median turn length		4 words	2 words	2 words

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APPENDIX 2: FULL “I’LL CALL THEM DOTS . . .” PASSAGE

1. Full ‘dots’ passage SALT code marking removed:

Speakers: F=Fassbinder, W=Weigert, D=Brendan Dassey

F: Brendan, I want you to, to relax, OK?

D: {Nods}.

F: Um, a little more comfortable here and stuff.

D: {Nods}.

F: And, what we like, you had a couple more days since we last talked now, which was Monday.

F: And you had a chance to reflect and breathe, I imagine, just ‘aaah’ {takes deep breath}.

D: {Nods}.

F: And we um. . .

W: Do you have a pen on you?

W: [unintelligible].

W: [unintelligible].only one?

W: I [unintelligible].

F: I got more.

W: OK.

F: And, uh I kinda call it, it, it’s a sense debriefing in a way, you know, just letting you talk to us a little.

D: {Nods}.

F: And um and, and, and we have had also a chance for two days now to look at what you said and, and listen to the, to tapes a little and stuff like that.

D: {Nods}.

F: And you know we look at that.

F: And we say, “well, you know, Brendan gave us, honestly gave us this information, this information, that information”.

F: Maybe I’ll call them dots or whatever.

D: {Nods}.

F: And some of the dots when we look at it, say, “well, I think we need some matching up here, just a little tightening up here or something”.

D: {Nods}.

F: We, we feel that, that maybe, I think Mark and I both feel that maybe there’s some, some more that you could tell us,

um, that you may have held back for whatever reasons.

F: And I don't wanna assure you that Mark and I are both are in your corner.

D: {Nods}.

F: We're on your side.

F: And you did tell us yourself that one of the reasons you hadn't come forward yet was because you were afraid.

D: {Nods}.

F: You were scared.

F: And, and one of the reasons you were scared was that you would be implicated in this.

F: Or people would say that you helped or did this.

D: Mhm {Nods}.

F: OK.

F: And that you might get arrested and stuff like that, OK?

D: {Nods}.

F: And we understand that.

F: One of the best ways to, to, to prove to us or more importantly, you know, the courts and stuff is that you tell the whole truth.

F: Don't leave anything out, don't make anything up because you're trying to cover something up a little.

F: Um, and even if those statements are against your own interest, you know what I mean, that, that makes you might, it might make you look a little bad or make you look like you were more involved than you wanna be uh, looked at um, it's hard to do.

D: {Nods}.

D: {Nods}.

F: But it's good from that vantage point to say "hey, there no doubt that you're telling the truth because you've now given the whole story".

F: You've even given points where it didn't look real good for you either.

D: {Nods}.

F: And, and, I don't know if I if you, are you understanding what I'm saying?

D: Mhm.

F: And, and that's why we kinda came here, to let you talk a little, maybe get some stuff off your mind or chest if you need

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to and then to tell us the whole truth, to take us through this whole thing that happened on Monday, not leaving anything out, not adding anything in.

F: Because if our guy looked at, looked at the tapes, looked at the notes and it's real obvious there's some places where some things were left out or maybe changed just a bit to, to maybe looking at yourself, to protect yourself a little um, from what I'm seeing even if I fill those in, I'm thinking you're alright.

F: OK?

F: Y- you don't have to worry about things.

D: {Nods}.

F: Um, we're, we're there for you.

F: Um and I and, and we know what Steven did.

F: And, and, and we know kinda what happened to you and what he did.

F: We just need to hear the whole story from you.

F: As soon as we get that and we're comfortable with that, I think you're gonna be a lot more comfortable with that.

F: It's gonna be a lot easier on you down the road uh, if this goes to trial and stuff like that.

F: We need to know that because it's probably gonna come out.

F: Think of Steven for a second.

F: Steven is already starting to say some things.

F: and eventually he's gonna potentially lay some crap on you and try and make it look like you were the bad person here.

F: Um, and we don't want that.

F: We want everything out front so we can say, "yeah, we knew that, Steven".

D: {nods}.

F: He told us that.

F: Yeah you know, you get my drift?

D: {Nods}.

F: I'm no - I don't know Mark has something or, something [unintelligible].

F: So I'm just gonna give you an opportunity to talk to us now, and and, and kind of fill in those gaps for us.

W: Honesty here Brendan is the thing that's gonna help you.

W: OK no matter what you did.

D: Mm {nods}.

W: We can work through that.

W: OK?

D: {Nods}.

W: We can't make any promises.

W: But we'll stand behind you no matter what you did.

W: OK?

D: {Nods}.

W: Because you're being the good guy here.

W: You're the one saying, "you know what"?

W: "Maybe I made some mistakes".

W: "But here's what I did".

W: The other guy involved in this doesn't wanna help himself.

W: All he wants to do is blame everybody else.

W: OK?

D: {Nods}.

W: And by you talking with us, is, it's helping you.

D: {Nods}.

W: OK?

W: Because the honest person is the one who's gonna get a better deal out of everything.

W: You know how that works.

D: Mhm {nods}.

W: You know.

W: Honesty's the only thing that will set you free.

W: right?

D: {Nods}.

W: And we know, like Tom said, we know, we reviewed those tapes.

W: We know there's some things you left out.

W: And we know there's some things that maybe weren't quite correct that you told us, OK?

W: We've done, we've been investigating this a long time.

W: We pretty much know everything.

D: {Nods}.

W: That's why we're talking to you again today.

D: {Nods}.

W: We really need you to be honest this time, with everything, OK?

D: {Nods}.

W: If, in fact, you did some things, which we believe some things may have happened, that you didn't wanna tell us

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about.

W: it's OK.

W: As long, as you can as long as you be honest with us, it's OK.

D: {Nods}.

W: If you lie about it that's gonna be problems. [sic]

W: OK?

D: {Nods}.

W: Does that sound fair?

2. Full "dots" passage as it appears in SALT transcript, including codes

Speakers: F=Fassbinder, W=Weigert, D=Brendan Dassey

F: Brendan, I want you (to) to relax, <OK> [SI-1]?

D: <{Nods}> [g] [SI-X].

F: (Um) *it/s a little more comfortable here and stuff [SI-0].

D: <{Nods}> [g] [SI-X].

F: <And> (what we like) you had a couple more day/s since we last talk/ed now, which was Monday [SI-3].

F: And you had a chance to reflect and breathe, I imagine, just <%faaah> {takes deep breath} [SI-2].

D: <{Nods}> [g] [SI-X].

F: And <> we (um)^

W: <Do you have a pen on you> [SI-1]?

: :02

W: XXX [SI-X].

W: XX only one [SI-X]?

W: I XX [SI-X].

F: I got more [SI-1].

W: OK [SI-X].

F: And (uh I kinda call it it) it/s *in a sense debriefing in a way, you know, just letting you talk to us a little [SI-3].

D: <{Nods}> [g] [SI-X].

F: (<And um> and and) and we have had[EW] also *had a chance for two day/s now to look at what you said <(and) and listen> (to the) to tape/s a little and stuff like that [SI-2].

D: <{Nods}> [g] [SI-X].

F: And you know we look at that [SI-2].

F: And we say, “well, you know, Brendan (gave us) honestly gave us this information, this information, that information” [SI-3].

F: Maybe **I’ll call them dot/s** or whatever [SI-1].

D: <{Nods}> [g] [SI-X].

F: <And some> of the dot/s when we look at it, say, “well, I think we need some matching up here, just a little tightening up here or something” [SI-4].

D: <{Nods}> [g] [SI-X].

F: (<We we feel that>, that maybe) I think Mark and I both feel that maybe there’s (some) some more that you could tell us, (um) that you may have held back for whatever reason/s [SI-5].

F: And I (don’t) wanna assure you that Mark and I (are) both are in your corner [SI-2].

D: <{Nods}> [g] [SI-X].

F: <We’re on> your side [SI-1].

F: And you did tell us yourself that one of the reason/s you had/n’t come forward yet was because you were afraid [SI-4].

D: <{Nods}> [g] [SI-X].

F: <You were scared> [SI-1].

F: (And) and one of the reason/s you were scared was that you would be implicated in this [SI-3].

F: Or people would say that you help/ed or did this [SI-2].

D: Mhm <{Nods}> [SI-X].

F: <OK> [SI-X].

F: And that you might get arrested and stuff like <that, OK> [SI-1][Y/Ntag]?

D: <{Nods}> [g] [SI-X].

F: And we understand that [SI-1].

F: One of the best way/s (to to) to prove to us or more importantly, you know, the court/s and stuff is that you tell the whole truth [SI-3].

F: don’t leave anything out [SI-1].

F: don’t make anything up because you’re try/ing to cover something <up a little> [SI-2].

F: (um) and even if those statement/s are against your own interest , <you know what I mean>, (that) that (make/3s you might) it might make you look a little bad or make you look

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like you were more involved than you wanna be (uh) looked at (um) it's hard to do [SI-9].

D: <{Nods}> [g] [SI-X].

D: <{Nods}> [g] [SI-X].

F: But it's good from that vantage point to say "hey, there *is no doubt that you're tell/ing the truth because you've now given the whole story" [SI-3].

F: You've even given point/s where it did/n't look real good for you either [SI-2].

D: <{Nods}> [G] [SI-X].

F: (And) and (I don't know if I if you) are you understand/ing what I'm say/ing [SI-2]?

D: Mhm [SI-X].

F: (And) and that's why we kinda came here, to let you talk a little, maybe get some stuff off your mind or chest if you need to and then to tell us the whole truth, to take us through this whole thing that happen/ed on Monday, not leaving anything out, not adding anything in [SI-4].

F: Because if our guy (look/ed at) look/ed at the tape/s, look/ed at the note/s and it's real obvious there's some place/s where some thing/s were left out or maybe changed just a bit (to to maybe looking at yourself) to protect yourself a little (um) from what I'm see/ing even if I fill those in, I'm think/ing you're alright [SI-9].

F: OK [SI-X][Y/Ntag]?

F: <(Y*) you don't have to worry about thing/s> [SI-1].

D: <{Nods}> [g] [SI-X].

F: (Um we're) we're there for you [SI-1].

F: (Um and I and) and we know what Steven did [SI-2].

F: (And and) and we know kinda what happen/ed to you and what he did [SI-3].

F: We just need to hear the whole story from you [SI-1].

F: As soon as we get that and we're comfortable with that, I think you're gonna be alot more comfortable with that [SI-4].

F: It's gonna be alot easier on you down the road (uh) if this go/3s to trial and stuff like that [SI-2].

F: We need to know that because it's probably gonna come out [SI-2].

F: Think of Steven for a second [SI-1].

F: Steven is already start/ing to say some thing/s [SI-1].

F: and eventually he's gonna potentially lay some crap on you and try and make it look like you were the bad person here [SI-3].

F: (Um) and we don't want that [SI-1].

F: We want everything out front so we can say, "yeah, we knew that, Steven" [SI-3].

D: {nodding} [G] [SI-X].

F: He told us that [SI-1].

F: Yeah you know, you get my drift [SI-2]?

D: {Nods} [g] [SI-X].

F: (I'm no*) I don't know *if Mark has (something or) something X [SI-X].

F: So I'm just gonna give you an opportunity to talk to us now (and and) and kind of fill in those gap/s for us [SI-1].

W: Honesty here Brendan is the thing that's gonna help you [SI-2].

W: <OK no> matter what you did [SI-1].

D: <Mm {nods}> [g] [SI-X].

W: We can work through that [SI-1].

W: OK [SI-X][Y/Ntag]?

D: <{Nods}> [g] [SI-X].

W: <We can't make any> promise/s [SI-1].

W: But we'll stand behind you no matter what you did [SI-2].

W: <OK> [SI-X]?

D: <{Nods}> [g] [SI-X].

W: Because you're be/ing the good guy here [SI-1].

W: You're the one say/ing, "you know what" [SI-2]?

W: "Maybe I made some mistake/s" [SI-1].

W: "But here's what I did" [SI-2].

W: The other guy involved in this does/n't wanna help himself [SI-1].

W: All he want/3s to do is blame everybody else [SI-1].

W: <OK> [SI-X][Y/Ntag]?

D: <{Nods}> [g] [SI-X].

W: And by you talk/ing with us, (is) it's help/ing you [SI-2].

D: <{Nods}> [g] [SI-X].

W: <OK> [SI-X][Y/Ntag]?

W: Because the honest person is the one who's gonna get a better deal out of everything [SI-2].

W: You know how that work/3s [SI-2].

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D: Mhm <{nods}> [g] [SI-X].

W: <You know> [SI-1].

W: Honesty's the only thing that will set you free [SI-2].

W: <right> [SI-X][Y/Ntag]?

D: <{Nods}> [g] [SI-X].

W: And (we know) like Tom said, (we know) we review/ed those tape/s [SI-2].

W: We know there's some thing/s you left out [SI-2].

W: And we know there's some thing/s that maybe were/n't quite correct that you told us, OK [SI-3][Y/Ntag]?

W: (We've done) we've been investigating this a long time [SI-1].

W: We pretty much know <everything> [SI-1].

D: <{Nods}> [g] [SI-X].

W: That's why we're talk/ing to you again <today> [SI-2].

D: <{Nods}> [g] [SI-X].

W: We really need you to be honest this <time, with everything, OK> [SI-1][Y/Ntag]?

D: <{Nods}> [g] [SI-X].

W: If, in fact, you did some thing/s, which we believe some thing/s may have happened, that you did/n't wanna tell us about [SI-4].

W: it's OK [SI-1].

W: (as long <as you can>) as long as you be honest with us, it's OK [SI-2].

D: <{Nods}> [g] [SI-X].

W: If you lie about it that's gonna be *a problem/s[EW:problem] [SI-2].

W: OK [SI-X]?

D: {Nods} [g] [SI-X].

W: Does that sound fair [SI-1][Y/NAux]?

APPENDIX 3: FEBRUARY 27TH MIRANDA WARNINGS WITH SALT CODING

- 0:04

W: XXX.

; :03

W: Alright, Brendan, (um) one thing I'm gonna ask you to do is when we start talking then you have to speak up, OK, kinda like I am <>, otherwise the thing won't pick up real[EW:very] well [SI-6].

D: <Mhm> {nods} [g] [SI-X].

W: But before we ask you any question/s Brendan (um) I have to read you your right/s [SI-2].

W: It/s just what we have <to do> [SI-2].

D: <{Nods}> [g] [SI-X].

W: XX one of those thing/s, OK [SI-X]?

W: Before I ask you any question/s you must understand your right/s [SI-2].

W: You have the right to remain silent [SI-1] {reading aloud}.

W: Anything you say can be used against you in court [SI-1].

W: (You have to) you have the right to talk to a lawyer for advice before we ask you any question/s and have him with you during the questioning [SI-2].

W: You have this[EW:the] right to the advice and presence of a lawyer even though you can not afford to hire one [SI-2].

W: We have no way of giving you a lawyer [SI-1].

W: But one will be appointed for you if you wish (and if and[EW] when you go to court [SI-3].

W: If you wish to answer question/s now without a lawyer present, you have the right to stop answering question/s at any time [SI-2].

W: You also have the right to stop answering question/s at any time until you talk to a lawyer [SI-2].

W: I have read the above statement of my right/s [SI-1].

W: I understand what my right/s are [SI-2].

W: I am will/ing to answer question/s and to make a statement [SI-1].

W: I do not want a lawyer [SI-1].

W: I understand and know what I am do/ing [SI-2].

W: No promise/s or threat/s have been made to me [SI-1].

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W: And no pressure of any kind has been used against me [SI-1].

W: Do you agree with that [SI-1]?

D: Yeah [g] [SI-X].

W: You have to speak up a little bit [SI-1].

D: Yeah [SI-X].

W: Yes?

D: {Nods} <yeah> [g][SI-X].

W: <OK>.

W: And then if you agree with making a statement I need you to sign right there {slides paper and pen to B} [SI-2].

W: And if you wanna read it you can read it there [SI-2].

- 1:30

= D signs paper

- 1:39

W: Why don't you put your initial/s here and put your initial/s here [SI-2] [G]?

W These are the two thing/s I read to you [SI-2].

- 1:44

= D signs paper

- 1:47

W: OK [SI-X].

W: And I'm just go/ing to put the place up here, Two_Rivers_Police_Department [SI-1].

; :02

W: And the date is two_twenty_seven_o_six [SI-1].

W: And the time is approximately three_twenty_one PM [SI-1].

; :03

W: {Writes on paper} OK.

W: I'll just put that over there for now [SI-1].